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v.15



# **REPORTS OF CASES**

**ARGUED AND DETERMINED**

**IN THE COURTS OF**

## **Common Pleas & Exchequer Chamber,**

**WITH**

**TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL  
MATTERS.**

**BY JOHN BAYLY MOORE,  
OF THE INNER TEMPLE, ESQ.**

**VOL. X.**

**CONTAINING THE CASES FROM HILARY TERM, 5 & 6 GEO. IV. 1825,**

**TO**

**TRINITY TERM, 6 GEO. IV. 1825, BOTH INCLUSIVE.**

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**OF THE**  
**COURT OF COMMON PLEAS,**  
**DURING THE PERIOD COMPRISED IN THIS VOLUME.**

**The Right Hon. Sir Wm. DRAPER BEST, Knt., Lord Chief  
Justice.**  
**The Hon. Sir JAMES ALLAN PARK, Knt.**  
**The Hon. Sir JAMES BURROUGH, Knt.**  
**The Hon. Sir STEPHEN GASELEE, Knt.**

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## A

T A B L E  
OF THE  
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ERRATUM.

Page 57, in margin, for "5 G. 4," read "5 G. 3."

# CASES

ARGUED AND DETERMINED.

IN THE

## Courts of Common Pleas

AND

## Exchequer Chamber,

IN HILARY TERM,

IN THE FIFTH AND SIXTH YEARS OF THE REIGN OF GEORGE IV.

◆  
BEFORE THE TWELVE JUDGES.

The King v. Henry Fauntleroy.

1824  
Nov. 25th.

THE prisoner (a partner in the banking house of Messrs. *Marsh, Sibbald, & Co.*) was tried and convicted before Mr. Justice *Park* and Mr. Baron *Garrow*, at the last *Old Bailey* Sessions, for forging and uttering a deed to transfer stock. The indictment contained eleven counts, each count setting out the instrument forged (*a*). The first count

capital offence, under the statute 2 Geo. 2, c. 25, s. 1.

(*a*) Of which the following is a copy:—"Know all men by these presents, that I, *Frances Young*, of *Chichester*, spinster, do make, constitute and appoint *William Marsh*, *Sir James Sibbald*, *Baronet*, *Josias Henry Stracey*, *Henry Fauntleroy*, and *George Edward Graham*, all of *Berners-street*,

bankers, my true and lawful attorneys, jointly, and each of them separately, for me, and in my name, and on my behalf, to accept all such transfers as are, or may hereafter be made unto me of any interest or share in the capital or joint stock of *3 per cent.* annuities, created by an act of Parliament

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was founded on the statutes 2 Geo. 2, c. 25, s. 1 (a), and

of the 25th year of the reign of his majesty King *George 2*, entitled, "An act for converting the several Annuities therein mentioned, into several Joint Stocks of Annuities, transferable at the Bank of *England*, to be charged on the Sinking Fund," &c. and by several subsequent acts: also, to receive and give receipts for all dividends due and payable for the same for the time being; likewise, to sell, assign, and transfer, all or any part of 5000*l.* being part of my said stock or annuities; to receive the consideration money, and give a receipt or receipts for the same, and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that my said attorneys, or either of them, shall do therein, by virtue hereof:—And, in case of my death, this letter of attorney, as to all matters and things which after my decease shall be done by my said attorneys, or either of them, by virtue of, or under colour, or in pursuance thereof, shall, so far as the Governor and Company of the Bank of *England* are interested or concerned, be as binding on my executors and administrators, as the same would have been upon me if living, unless notice in writing of my death shall have been previously given to the said Governor and Company by my executors or administrators, or by some person or persons interested in the property to which this letter of attor-

ney refers: And unless such notice be given, I hereby promise and engage, and bind myself, my executors, or administrators, to and with the said Governor and Company of the Bank of *England*, that they, my said executors, or administrators shall and do allow, ratify and confirm, as good, valid and effectual, against them, and against my estate, whatsoever shall or may be done by my said attorneys, or either of them, after my decease, so far as the said Governor and Company of the Bank of *England* shall or may be, in any way or manner, interested therein. In witness whereof, I have hereunto set my hand and seal, the 31st May, 1815.

*Frances Young. (L. S.)*

Signed, sealed, and delivered  
in the presence of } Clerks to Marsh.  
John Watson, } Sibbald, & Co.,  
James Tyree, } bankers, Berners-  
street.

(a) By which it is enacted, "that if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange, or promissory note for payment of money, or any acquittance or receipt, either for money or goods, with intention to defraud any person whatsoever, or shall utter or publish as true, any false, forged,

**31 Geo. 2, c. 22, s. 78 (a),** and charged the prisoner with forging a certain *deed*. The second count upon the same statutes charged him with uttering and publishing as true a certain false, forged and counterfeited *deed*, knowing it to be false, forged and counterfeited. The third count was framed on the statute **45 Geo. 3, c. 89, s. 2 (b)**, and charged the prisoner with disposing of and putting away a certain false, forged and counterfeited *deed*, knowing the same to be forged. These three counts charged the offence to have been committed with intent to defraud the

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or counterfeited deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acquittance or receipt, either for money or goods, with intention to defraud any person, knowing the same to be false, forged, or counterfeited, then every such person, being thereof lawfully convicted, according to the due course of law, shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy."

(a) Which, after reciting that doubts might arise whether the punishment inflicted by the **2 Geo. 2, c. 25**, extended to the commission of the like forgeries with an intention to defraud a corporation, enacted, "that a person forging or publishing any deed, will, obligation, acquittance, &c. &c., with intent to defraud any corporation, should be deemed guilty of felony, without benefit of clergy."

(b) By which it is enacted, "that if any person shall, after the pass-

ing of that act, forge, counterfeit, or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation under the common seal of the Governor and Company of the Bank of *England*, or any indorsement thereon, or shall offer or dispose of or put away any such forged, counterfeit, or altered note, bill, dividend warrant, bond or obligation, or the indorsement thereon, or demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said Company, or any their officers or servants, knowing such note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, to be forged, counterfeited, or altered, with intent to defraud the said Governor and Company, or their successors, or any other person or persons, body or bodies politick or corporate whatsoever, every person or persons so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy."

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Governor and Company of the Bank of *England*. The fourth, fifth and sixth counts were similar to the first, second and third, with the exception of charging the prisoner with intent to defraud one *Frances Young*, (the person whose name had been forged). The seventh, eighth and ninth counts were also similar to the first, second and third, the offence being laid with intent to defraud one *Charles Flower*, (the person to whom the stock had been sold by the prisoner under colour of the forged power of attorney). The tenth and eleventh counts, which were nearly similar, were framed on the statutes 8 Geo. 1, c. 22, s. 1, and 31 Geo. 2, c. 22, s. 77 (a), for forging and counterfeiting a certain *letter of*

(a) The latter of which, after reciting that doubts might arise, whether the punishment inflicted by the 8 Geo. 1, c. 22, extended to the commission of forgery and offences in relation to such capital stocks and funds as had been established by the authority of Parliament since the passing of that act, enacted, "that if any person should forge or counterfeit, or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any letter of attorney, or other authority or instrument, to transfer, assign, sell, or convey any share or shares, or any part of any share or shares, of or in any capital stock or funds of any body or bodies politick or corporate established, or which shall be established, by any act or acts of Parliament; or to receive any dividend or dividends attending any share or shares, or any part of any share or shares, of, or in, any such capital stock or funds as aforesaid; or to receive any annuity or annuities, in respect

whereof any proprietor or proprietors have or shall have any transferable share or shares of or in any capital stock or stocks which now are, or hereafter shall be established by any act or acts of Parliament, in proportion to their respective annuities; or shall forge or counterfeit, or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any the name or names of any of the proprietors of any such share or shares in stock, or of any the persons entitled to any such annuity or annuities, dividend or dividends, as aforesaid, in or to any such pretended letter of attorney, instrument, or authority; or shall knowingly or fraudulently demand, or endeavour to have, any such share or shares in stock, or any part thereof, transferred, assigned, sold, or conveyed, or such annuity or annuities, dividend or dividends, or any part thereof, to be received by virtue of any such counterfeit or forged letter of attorney, authority, or

attorney. The Jury found the prisoner guilty on the second, fifth and eighth counts, for uttering a forged deed, knowing it to be forged, with intent to defraud the Bank of England, Francis Young, and Charles Flower respectively; and a verdict was entered accordingly.

THE  
THE LATE  
PRESIDENT

Mr. Alley, Mr. Brodrick, and Mr. C. Phillips, in arrest of judgment, contended, that the Court could not, on this conviction, give a judgment affecting the life of the prisoner; as the uttering of such a forged instrument as was stated on the record, was not a capital offence:—a power of attorney for the transfer of government stock not being a *deed* within the meaning of the statute 2 Geo. 2, c. 25, s. 1.—The objection, however, was over-ruled, and the prisoner received sentence of death. He afterwards petitioned the Crown; and his case was argued in the long room at the *Sessions House, Westminster*, on the 24th and 25th November, 1824, before the twelve Judges: the point reserved being, whether the instrument in question were a *deed* within the meaning of the statute, 2 Geo. 2, c. 25, s. 1.

Mr. Brodrick for the prisoner.—The question is, whether the *power of attorney* as set out on the face of this indictment, and described as a *deed*, fall within the language and meaning of the statute 2 Geo. 2, c. 25? *First*, a *power of attorney* is not, in the legal acceptation of the

instrument, or shall falsely and deceitfully personate any true and real proprietors of the said shares in stock, annuities and dividends, or any of them, or any part thereof, and thereby transferring or endeavouring to transfer the stock, or receiving or endeavouring to receive the money, of such true and lawful proprietor, as if such

offender were the true and lawful owner thereof, then, and in every or any such case, all and every such person and persons, being thereof lawfully convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy."

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term, a *deed*; and *secondly*, it is not such an instrument as falls within the proper signification of the term *deed*, in the statutes 2 Geo. 2, c. 25, 31 Geo. 2, c. 22, and 45 Geo. 3 c. 89. In *The King v. Wait* (*a*), the indictment was framed in terms similar to the present; yet the only question raised was, as to the competency of a witness; and the prisoner's counsel there assumed that the power forged was a *deed*, in order to support his argument; that, as such, it could only be vacated by *deed*; and that, consequently, the witness, who was the person whose name had been forged, and was therefore interested, could not be examined without a release by *deed*: and it was not necessary for the counsel for the Crown to contest this point, as it was sufficient for him to shew, that the instrument might be revoked without *deed*. In *The King v. Lyon* (*b*), this question seems to have been decided; but it arose incidentally; the principal point being, not as to whether a power of attorney, similar to the present, were a *deed* under the statute 2 Geo. 2, c. 25, but, whether the forgery of a power of attorney to receive seamen's prize-money, not being in the form prescribed by the statute 45 Geo. 3, c. 72, s. 92, were a capital offence under that statute. Whatever, therefore, may have been the decisions in these two cases, if it can be shewn that a power of attorney is not a *deed*, or that it is not such an instrument as was contemplated by the Legislature in passing the statutes on which the present conviction rests, this case must be looked at, as if the question now arose for the first time, and must be considered as *res integra*.—First, the word *deed*, in its legal and correct signification, means, an instrument in writing, signed, sealed, and delivered, and it must contain some matter of contract or grant on the part of the person by whom it is executed. In *Comyns's Digest* (*c*), a *deed* is

(*a*) 7 B. Moore, 473; S. C. 1      (*b*) 2 Russell on Crimes, 1692.  
Bing. 121.      (*c*) Tit. "Fait," (A 1).

defined to be, "a writing containing a contract, and signed, sealed and delivered by the party." Lord *Coke* (a) says, " *un fait*, a deed, (*factum*). This word (deed), in the understanding of the common law, is an instrument written on parchment or paper, whereunto ten things are necessarily incident;" one of which he states to be, "a thing to be contracted for;" and he again defines a deed as follows (b), " *Fait, factum, Anglice*, a deed, and signifieth in the common law, an instrument consisting of three things, *vis. writing, sealing, and delivery*, comprehending a bargain or contract between party and party, man or woman." *Speelman* (c) says, " *Factum à forensibus nostris dicitur scriptum solenne, quo firmatur donum, concessio, pactum, contractus;*" and this definition is adopted by *Dufresne*, in his *Glossary*, who refers to *Speelman* as an authority. In *Wood's Institutes* (d), it is laid down, that " a deed, (*factum*), in the understanding of the common law, is an instrument written on parchment or paper, comprehending a contract betwixt party and party, and that among other things necessarily incident to it, are persons able to contract, or be contracted with, by a sufficient name, and a thing to be contracted for." In *Cowell's Law Interpreter* (e), a deed is defined to be, " a writing, sealed and delivered, to prove and testify the agreement of the parties whose deed it is, and consisting of three principal points, *writing, sealing, and delivery*. By *writing*, is shewed the parties' names to the deed, their dwelling places, degrees, things granted, upon what consideration, the estate limited, the time when granted, and whether simply or upon condition, &c. 2. *Sealing* is a farther testimony of their consents, as appears by these words, *In witnessis whereof, &c.* *In cœsus rei testimonium, &c.*, without which the deed is insufficient." And in *Cunningham's*

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(a) Co. Lit. 35 b.      (b) Id. 171 b.      (c) Gloss. tit. "Factum."  
(d) 3d Edi. 223.      (e) Tit. "Fait."

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*Law Dictionary* (a), a deed is stated to be an instrument written on parchment or paper, consisting of three things, *viz. writing, sealing and delivery*; and comprehending a contract or bargain between party and party. So, in *Tomlin's Law Dictionary* (b), "factum" is defined to be "an instrument on parchment, or paper, but chiefly in parchment, comprehending a contract or bargain between party and party; or an agreement of the parties thereto, for the matters therein contained; and it consists of three principal points: *writing, sealing and delivery*; writing, to express the contents; sealing, to testify the consent of the parties; and delivery, to make it binding and perfect:"—and *Termes de Ley* is referred to as an authority in support of that definition.

In short, all the old authorities agree that a *deed* must contain matter of contract or of grant; a *power of attorney* contains neither; it neither conveys, secures, nor releases any interest; it confers a mere authority or power, and is revocable without *deed*, by mere matter *in pais*; whereas, if it were a *deed*, it could only be revoked by *deed*, on the well known and established rule that "*nihil tam conveniens est naturali æquitati, quam unumquodque dies solvi eo ligamine quo ligatum est*. From the earliest times, a marked distinction has been observed between *deeds*, or instruments of grant or contract under seal, and instruments conferring a power: the former have been uniformly termed *facta* or *chartæ*, whilst instruments of the latter description have been commonly styled *literæ*. In *Madox's Formulare Anglicanum* (c), a power to enfeoff, in the fourth year of the reign of *Edw. 2d*, is termed *literæ*, while the *deed* of feoffment to which it refers, is styled, *carta, viz. "Attornavi, et loco meo posui, délectum meum W. de W. ad ponendum H. I. de N. in sey-sinam &c. secundum quod in quoddem cartâ inter me et*

*prædictum H. I. inde facta et indentata plenius continetur; ratum et gratum habitura quicquid idem W. nomine meo in præmissis duxerit faciendum. In cuius rei testimonium, has literas sigillo meo signatas fieri feci patentes."* In the same book (*a*) is another power of attorney, dated 1235, in the following words: " *Universis Christi fidelibus præsentes literas inspecturis.*" — So *Fleta* (*b*), in treating of forgery, says, " *Crimen vero falsi dicitur, cum quis accusatus fuerit quod sigillum regis, vel appellatus, quod sigillum domini sui, de cuius familiâ, fuerit, falsaverit, et brevia inde consignaverit, vel chartam aliquam vel literam ad exhaeredationem domini, vel alterius damnum, sic sigillaverit.*" Wills, though signed and sealed, are not *deeds*; neither are awards, though signed and sealed; and no *profert in curiam* of an award is necessary; *Dod v. Herbert* (*c*). A warrant of a Justice of the Peace, though under seal, is not a *deed*: nor is an inquisition taken by the sheriff on a writ of inquiry, and returned under seal.

This distinction between *deeds* and *writings sealed*, has always prevailed: and from the earliest enactment against forgery (*d*), it appears that there are many instruments under seal that are not comprised within the legal description of deeds; the 2nd section of that statute enacts, " that if any person shall, upon his own head and imagination, or by false conspiracy and fraud with others, falsely forge or make any false *deed*, charter, or *writing sealed*, court roll, or the will of any person in writing, &c. &c. and shall be thereof convicted, he shall be set upon the pillory and have both his ears cut off, &c.:" and in *Taverner's* case (*e*), which was decided only ten years after the passing of that statute, the forging the customary of a manor, with seals attached to it, purporting to be the seals of the copyholders, was held to be forging a *writing sealed*, within the meaning of the act. The writ given by the statute 1 Hen.

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(a) P. 346. (b) Lib. 1, c. 22, p. 32. (c) Sty. 459.  
(d) 5 Eliz. c. 14. (e) Dyer, 322 b.

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5, c. 3, is against those who forge and make "*falsa facta et manentia*." In the *Year Book*, 35 Hen. 6 (a), in a writ of forger of false deeds, founded on this statute, the plaintiff by his writ alleged, that the defendant had forged *diversa falsa facta et manentia*, and the defendant demanded judgment of the count; for that such count alleged that the defendant had forged a certain *deed* of feoffment, by which one *T.* had enfeoffed certain persons, &c. and also a *writing* or *manement*, by which the said *T.* had made one *C.* his attorney, to deliver *seisin*, &c., so that the count was not conformable to the writ, for that the writ alleged *diversa falsa facta et manentia*, and the count only alleged the forgery of *one deed*, and Lord Chief Justice *Prisces* was of this opinion; and although the ultimate disposal of this case does not appear, it is a strong authority to shew that the term *deed* is not the proper appellation for a letter of attorney: and the insertion of the words *writing* or *manement* in the count may be accounted for on this principle. Although it may be contended, that the covenant contained in the present power of attorney amounts to a contract or bargain between party and party, yet similar covenants have constantly been inserted in these instruments, as appears from that set out in *Mazar* of the date of *Edw. 2d.* Here, however, the power of attorney does not in effect contain that which amounts to a legal covenant; it is altogether useless, and does not express any more than the law would imply without it. The character of an instrument must be taken with reference to its purpose; mere words of covenant do not of themselves make a covenant, and no action could be maintained by the Bank upon this covenant, as it is one which, in its nature, can never be broken. A covenant by *A.* not to sue *B.*, is a release, and must be pleaded as such, and the terms here used, though in form a covenant, are nothing more than a repetition of the preceding words of authority,

and do not give the instrument the legal effect of a covenant.

*Secondly*, although the term *deed* might, at common law, in strictness comprehend a power of attorney, still it was not within the intention of the Legislature in passing the statute 2 Geo. 2, c. 25; and that is not only to be collected from the distinction laid down in the authorities referred to, but from the general tenor of all the statutes which have been passed touching the crime of forgery; and the fact of there being some statutes relating to deeds, and others to powers of attorney, raises a strong presumption to shew that the Legislature considered them as distinct objects of penal legislation. Every statute ought to be construed and expounded, not according to the letter, but according to the intent of Parliament (*a*). Penal statutes must always be construed strictly, and cannot be extended to other cases than those intended by the Legislature, although they come within the mischief contemplated, and intended to be remedied (*b*): and a case out of the mischief so intended to be remedied, must be construed to be out of the provision, although it be within the words of the statute (*c*). And to collect such an intent, the preamble and reason of passing an act of Parliament must be considered (*d*). The preamble of the statute 2 Geo. 2, c. 25, recites that "whereas the wicked, pernicious and abominable crimes of forgery, perjury, and subornation of perjury, have of late time been so much practised, to the subversion of common truth and justice, and prejudice of trade and credit, that it is necessary, for the more effectual preventing of such enormous offences, to inflict a more exemplary punishment on such offenders, than by the laws of

(*a*) Com. Dig. tit. "Parliament," R. 10; 10 Rep. 57 b; 2 Roll. Abr. 318; Plowd. Com. 359, 363.

(*b*) *Per Lord Kenyon, in Jenkins v. Thomas, 4 Term Rep. 666.*

(*c*) 2d Inst. 386; 5 Barn. & Ald. 501.

(*d*) Com. Dig. tit. "Parl." R. 11; Plowd. Com. 173, 204.

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this realm can now be done." The statute then proceeds to enact, "that if any person shall forge or counterfeit &c. or shall utter or publish as true, any false, forged, or counterfeited deed, will, testament, bond, &c. with intent to defraud any person, knowing the same to be false, forged, or counterfeited, then every such person being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy." Here, therefore, it is clear, that the intention of the Legislature, as manifested in the preamble, was to inflict a more severe and exemplary punishment on persons who forged deeds than the law had before authorised; but such intent was inoperative as applied to powers of attorney for the transfer of stock; because by a prior statute (*a*), in the preamble of which deeds are not mentioned, it was made a capital offence to forge a *letter of attorney* for the transfer of the capital stock of Joint Stock Companies. The Legislature could not, therefore, have meant by the word *deed* in the statute 2 Geo. 2, c. 25, to include a *letter of attorney*, against the forgery of which the 8 Geo. 1, c. 22, already contained a specific enactment. The statute 31 Geo. 2, c. 22, s. 78, after reciting that doubts might arise whether the punishment inflicted by the statute, 2 Geo. 2, c. 25, extended to the commission of the several species of forgery therein mentioned with intent to defraud any corporation, re-enacted the latter statute, and supplied the defect; and it is a strong and almost convincing fact, that, by the 77th section of the statute 31 Geo. 2, the punishment imposed by 8 Geo. 1, is extended to the forging any letter of attorney relating to the transfer of stock or funds established or to be established since the passing of the 8 Geo. 1; for if it had been the intention of the Legislature, that a *letter of attorney* should be comprised under the term *deed* used in the statute 2 Geo. 2, c. 25, and in the 78th section of 31 Geo. 2, c. 22, this provision would have been

(a) 8 Geo. 1, c. 22.

altogether nugatory. The 77th section, therefore, expressly relating to *letters of attorney*, and the 78th to *deeds*, incontrovertibly proves that they were looked upon by the Legislature as objects of distinct provisions, and that it was never intended that *letters of attorney* for the transfer of stock should be, as is now supposed, included under the word *deed*. It is also clear that the forgeries of *powers of attorney* and of *deeds* have invariably called for separate enactments, as will appear on examination of the various statutes on this subject.

To say that *letters of attorney* do not necessarily import instruments signed, sealed, and delivered, but also comprehend instruments simply under hand, which the Legislature intended to protect from forgery, is no answer to the argument; for, even allowing that attorneys may, for some purposes, be appointed by mere writing under hand, it is well known, and must have been within the view of the Legislature, that letters of attorney for the transfer of stock as well at the time of the passing of the statute 8 Geo. 1, as since, were and have necessarily been, in compliance with the Bank regulations, signed, sealed, and delivered, and it was evidently intended, by the 8 Geo. 1, and 31 Geo. 2, c. 22, s. 77, that the forgery of such instruments should be prevented.

By 4 Geo. 3, c. 25, the charter of the Bank of *England* was continued, and the 15th section extended the provisions of the statutes 8 Geo. 1, and 31 Geo. 2, c. 22, s. 77, to the capital stock of bodies politic or corporate which then were, or thereafter should be, established by any act of Parliament; and *letters of attorney* are therein only mentioned, and not *deeds*. So also, the 37 Geo. 3, c. 122, inflicts the punishment of transportation on persons forging the names of attesting witnesses to letters of attorney for transferring government stocks, &c. but does not extend to *deeds*; and the 45 Geo. 3, c. 89, which consolidates the provisions of 2 Geo. 2, c. 25, and 7 Geo. 2, c. 22, re-

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specting deeds, &c. extends such provisions to every part of *Great Britain*, and does not contain the words "letters of attorney." The 31 *Geo. 2*, c. 10, s. 23, and 9 *Geo. 3*, c. 30, s. 6, relate respectively to the forging of letters of attorney to receive seamen's wages, and to the uttering of them. The 45 *Geo. 3*, c. 72, s. 121, and 57 *Geo. 3*, c. 127, s. 4, re-enact, consolidate, and extend the provisions of 31 *Geo. 2*, c. 10, s. 23, and 9 *Geo. 3*, c. 30, s. 6, and all of them expressly treat of *letters of attorney*, but make no mention of *deeds*. The letters of attorney for receiving seamen's wages, alluded to in these several statutes, are signed, sealed and delivered, like the present; and to make the forgery of such instruments felony by express enactments would have been altogether nugatory and futile, if the statute 2 *Geo. 2*, c. 25, had been meant to include them under the general word, *deed*. As, therefore, the forging of letters of attorney has been made a matter of distinct legislation, and, inasmuch as enactments such as those referred to would have been clearly unnecessary, if *letters of attorney* were comprised within the term *deeds*, the just application of the acknowledged rules of construction naturally leads to the conclusion, that the Legislature could not have intended to include *letters of attorney* in the statute 2 *Geo. 2*, c. 25. Unless, therefore, this mode of construction be adopted, in all the statutes relating to this subject, the Legislature must be deemed to have used language without a distinct and definite meaning, and to have made enactments totally inconsistent and at variance with each other. It is, therefore, utterly impossible that the offence set forth in this indictment can be considered to be within the words or intent of the statutes on which the conviction rests. Although, therefore, a *power of attorney* may be a *deed*, yet it is not within the meaning of the statute on which the prisoner has been convicted; and therefore the uttering it, knowing it to be forged, is not a capital offence within the terms of that act.

Mr. Serjeant *Bosanquet*, for the Crown.—The first proposition advanced on behalf of the prisoner, that a power of attorney signed, sealed and delivered, is not a *deed*, is altogether untenable; a contract or bargain is not the essence of a deed. The definitions referred to from Lord *Coke*, and on which many, if not all, the subsequent authorities are founded, convey too limited a meaning of the word “*deed*;” and even that learned writer himself, in numerous other passages, speaks of instruments as *deeds* which have no relation whatever to contracts between party and party. Thus, a release, which does not necessarily arise out of a matter of contract, must be by *deed* (*a*); so a confirmation (*b*). A disclaimer by deed is not founded on a contract (*c*). In *Coke Littleton* (*d*), it is laid down, “that the authority to deliver scisin must be by *deed*, for a *letter of attorney* is as much as a warrant of attorney by *deed*, for *literæ* do signify sometimes a *deed*, as *literæ acquitancie* do signify a deed of acquittance; and herewith agreeth *Britton* (*e*).” This authority not only proves that a contract is not essential to make a deed, but is an answer to that part of the argument on the alleged difference of signification between the terms *charia* or *facta*, and *literæ*, and which has been so much dwelt on. Lord *Coke* also expressly says in *Goddard's case* (*f*), “there are but three things of the essence and substance of a deed, that is to say, writing on paper or parchment, sealing, and delivery.” So, in *Rolle's Abridgment* (*g*), it is laid down, that there ought to be these things to the making of a deed, that is to say, writing, sealing and delivery. The whole of the quotation from *Spelman*, as to the definition of a deed, was not cited: it is “*Factum & forensibus nostris dicitur scriptum*.

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(*a*) Co. Litt. 264 b.

(*d*) P. 52 a.

(*b*) Id. 295 b.

(*e*) P. 101 b.

(*c*) Id. 102 a.

(*f*) 2 Rep. 5.

(*g*) Tit. *Faits*, (D).

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*tum solenne, quo firmatur donum, concessio, pactum, contractus, et hujusmodi; alias charta; et est vel simplex vel indentatum; hoc ubi plures contrahunt; illud, ubi solus quispiam agit.*" The latter part of the sentence, therefore, clearly refers to matters which are not of contract. In the case cited from the *Year Books*, the decision is not given, but it may be fairly collected, from the statement of the case, that, if the letter of attorney had been alleged in the count to have been a deed, no objection could have been taken; or, in other words, that the letter of attorney might have been properly called a *deed*. In *Taverner's* case the only question was, whether the forging of a customary of a manor was the forging of a *writing sealed* within the 5 *Eliz.* c. 14; and no question was raised as to what was or was not a deed. As to awards, all the authorities tend to shew that they are not necessarily deeds, but become so if executed with the requisite formality of deeds; for in *Dod v. Herbert*, Lord Chief Justice *Glyn* drew the distinction, stating, that an arbitrament might be made without a deed, and, if so, it necessarily follows that it may be done by deed; and Mr. Justice *Lawrence*, in the case of *Brown v. Vawser* (a), expressly says, "if an arbitrator deliver an award under seal as a *deed*, it must then have a deed stamp; but that though it were to be by a writing under seal, yet if it were not delivered as a deed, it was sufficient if it had the common award stamp." A licence may also be by deed, although there be no contract: so, if a man levy a fine without a deed to lead the uses, the uses would result to himself, and if, without contract, he declare the uses to himself for life, or to his wife for life, remainder to his first and other sons in tail, such declaration in writing, sealed and delivered, would *ex vi termini* be a deed, although totally independent of any contract. If, therefore, the proposition that a deed must contain a contract or bargain, be disproved, it is scarcely necessary to advert to the argu-

ments that have been urged as to the nature of the covenant expressed in this instrument; which is by no means so nugatory and unimportant as has been supposed. It is necessary, in order to bind the representatives after the death of the party, and was inserted, after great deliberation, with a view to protect the *Bank* as to acts done under a power, before they could have notice of the death of the principal; for, a mere power ceases as a matter of course with the life of the grantor.

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Secondly, it has been insisted that although the power in question may be a deed, yet that it is not such an instrument as to fall within the meaning of the statutes 2 Geo. 2, c. 25; 31 Geo. 2, c. 22; and 45 Geo. 3, c. 89. With respect to the former of these statutes, it is quite clear that a power of attorney, signed, sealed and delivered, is a deed within the contemplation and intention of the Legislature. It is said, however, that the 8 Geo. 1, c. 22, had expressly included this species of instrument, and that, in subsequent acts, a power of attorney is also provided for, and, therefore, that it could not be brought within the meaning of 2 Geo. 2, c. 25, although clearly within its language. It is an established rule of law, that affirmative words in a statute do not repeal provisions in a prior statute with which they are consistent; and all the statutes subsequent to 2 Geo. 2, will, on examination, be found to be directed to remedy some particular mischief, and not to contemplate such a distinction as is now contended for. The forgery of a power of attorney for the transfer of shares in the public funds, was an offence not provided for at the time of passing the 2 Geo. 2, c. 25. The argument, therefore, drawn from the preamble of that act, is groundless. The particular object of the statute 31 Geo. 2, c. 22, s. 77, was to extend the provisions of 8 Geo. 1, c. 22, to capital stocks created subsequently to the passing of that statute, and also by s. 78, to extend the provisions of 2 Geo. 2, c. 25, s. 1, to forgeries committed with intent to defraud corporations. The

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4 Geo. 3, c. 25, merely extends the provisions of 8 Geo. 1, c. 22, and 31 Geo. 2, c. 22, to capital stocks for bodies politic and corporate then established, or to be established by subsequent acts. The 37 Geo. 3, c. 122, does not at all affect the present question, as it applies only to the forging of the names of attesting witnesses to powers of attorney. According, therefore, to the true and legal construction of the several statutes, the instrument in question has been properly described as *a deed*. That it is so, is demonstrated by the uniform usage and practice of proceeding against offences of this nature under the statute 2 Geo. 2, c. 25. In the case of *Western*, who was convicted and executed in 1796, there were two counts in the indictment for forging a deed, two for uttering it knowing it to be forged, and two for forging a *power of attorney*; but in that case there was evidence of the actual forgery. In *Cock's* case, in 1802, the indictment was in the same form, and there was no evidence of the actual forgery; the prisoner must therefore have been convicted on the count for uttering. In 1804, *Ann Hurle* was convicted and executed on an indictment containing four counts, viz. two for forging, and two for uttering a forged deed knowing it to be so, under the statute 31 Geo. 2, c. 22, and alleging the intent to be to defraud the Governor and Company of the Bank of *England*. In 1816, *Joseph Boyce* was convicted of forging and uttering a deed under 2 Geo. 2, c. 25, which deed was described in the indictment as a *power of attorney*. In 1817, *Mary Ann James* was convicted under similar circumstances. In *The King v. Wait*, the objection now taken was not even suggested by counsel, or the Court, although the nature of the instrument was there fully considered. [Mr. Justice Park referred to the case of *Sophia Pringle*, who was executed in 1787, under the statute 2 Geo. 2, c. 25, for forging and uttering as true a forged *deed*, purporting to be a *power of attorney*]. If there had been the slightest doubt as to the propriety of these convictions,

all of which were anterior to the passing of the statute 45 Geo. 3, c. 89, that statute would have removed those doubts by the express mention of "powers of attorney;" but the words used in the previously-existing statutes are there followed *verbis cotidie*.

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*Mr. Brodrick* in reply.—The true and legal definition of a deed from the time of Lord Coke, supported as it is by a long series of high authorities, ought not to be questioned, because a few loose *dicta*, made with no view to the defining of the legal ingredients of a deed, chance to be scattered through various parts of the works of that learned writer. But supposing Lord Coke's definition to be inaccurate, or too narrow, still, that of *Spelman* cannot be objected to, within which it is impossible to include a letter of attorney. The word *huiusmodi*, in the passage there referred to, following, as it does, *donum*, *concessio*, *pactum*, *contractus*, can only refer to instruments of a similar kind; and all these words imply a bargain or grant of some interest, and therefore cannot include a power. So, as to the latter part of the passage, the word *agit* can only be said to apply to the conveyance of an interest, and not to the granting of a power. All the instruments enumerated on the part of the Crown, as releases, confirmations, &c. convey an interest, although they may not contain a contract; and thus they are strictly within *Spelman*'s definition. The mere signing, sealing and delivery, will not constitute a deed. There must be, besides these formalities, apt words and apt subject matter. The case from the Year-books was cited to shew that it was there considered doubtful whether a letter of attorney could be pleaded as a deed; and in the Table, the case is thus referred to: "(a) *Briefe suppose forg de divers faites et muniments, et count d'un fayt et escript per que liuery doit este fait pur atturne et male—quere.*" And

(a) Le Table, Forger de Faits.

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*Brooke* in his *Abridgment* (*a*), states the case thus: “*Le brefe fuit diversa falsa facta et munimenta, et le count fuit de un fait de feffement et un lettre d'attorney, et ideo optima opinio que le count abatera pur ce que n'est garr per le count,*” &c. The case of *Brown v. Vawser* (*b*) only decided, that an award not delivered as a *deed*, does not require a *deed stamp*. The argument, that *deeds* and *letters of attorney* are considered as distinct instruments, is strongly supported by the stamp acts, which, throughout, class them under separate heads, and subject them to different regulations and to different duties; and the instrument in question had not and could not have had a *deed stamp*, and yet it is described on the record as a *deed*. That the covenant contained in the power in question, was not a contract, on which an action could be maintained, but that it might be pleaded as a release, in order to prevent circuity of action, is clearly proved by the cases of *Deux v. Jeffreys* (*c*), *Hodges v. Smith* (*d*), *Ayliff v. Scrimshire* (*e*), and the opinion of Mr. Justice *Buller* in *Smith v. Mapleback* (*f*), where he said—“ In doubtful cases, where the parties express themselves inaccurately, the Courts will expound their contracts according to their intention; and it is a maxim in law so to judge of contracts as to prevent a multiplicity of actions; and it is on that ground that the Courts have construed express words of covenant into a release: as, supposing the obligee of a bond covenanted that he would not sue on it, the Courts say that shall operate as a release; for if it operated only as a covenant, it would produce two actions.”

The Judges afterwards made their report to his Majesty in council; and the prisoner was executed.

(*a*) Tit. “*Forger de Faits*,” pl. 7.

(*b*) 4 East, 584.

(*c*) Cro. Eliz. 352.

(*d*) Cro. Eliz. 623.

(*e*) 1 Show. 46.

(*f*) 1 Term Rep. 446.

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## GALLEY v. BARRINGTON and Others.

THE following case was sent, by the direction of his Honor the Vice Chancellor, for the opinion of the Judges of this Court:—

“ By indentures of lease and release, bearing date respectively the 22nd and 23rd *May*, 1738, being the settlement made upon the marriage of *John Galley* and *Ann* his wife, both deceased, (the release being of four parts, and made between *Tamar Galley*, widow, *Daniel Galley* and *Ellen* his wife, and *John Galley*, son and heir apparent of *Daniel Galley* of the first part; *Thomas Podmore* of the second; *Moses Steele* of the third; and *Ann Steele*, spinster, daughter of *Moses Steele*, of the fourth part:—it was witnessed, that in consideration of a marriage then shortly to be had and solemnized between *John Galley* and *Ann Steele*, and of a competent portion of the said *Ann Steele*, accruing to the said *John Galley*, they, *Tamar Galley*, *Daniel Galley* and *Ellen* his wife, and *John Galley*, did, and each and every of them did grant, release and confirm unto *Thomas Podmore*, his heirs and assigns, a certain messuage or tenement in *Arclid* in the county of *Chester*, and certain lands, tenements, messuages, hereditaments and premises therein particularized, being the messuage or tenement, lands and tithes in question: To hold the same unto the said *Thomas Podmore*, his heirs and assigns, to the use of *Moses Steele*, his executors, administrators and assigns, for a term of ninety-nine years, upon certain trusts, which have long since determined; with remainder to the use of *John Galley* and his assigns for life, without impeachment of waste; with remainder to *Thomas Podmore* in trust to preserve the contingent remainders; with remainder to the

By a marriage settlement, an estate was limited to the use of *J. G.* for life, remainder to the use of the first son of *J. G.* upon *A. S.*, his intended wife, and for default of such issue to the use of the second, third, and other sons of *J. G.* upon *A. S.* severally and successively, as they shall be in seniority of age, and of the several heirs male of their several bodies;—and for default of such issue, then, in case *A. S.* should be *enciente* by *J. G.* at the time of his death, to the use of *T. P.* until *A. S.* should be delivered, in trust for after-born child or children; and in case such child or children should be a son or sons, to the use of such after-born son and sons severally and successively, as they should be in priority of birth, and the heirs male of the body and bodies of such after-born son and sons:—*Held*, that the eldest son of

*J. G.*, the settlor, took an estate tail under the above limitations.

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use of *Moses Steele*, his executors, administrators and assigns, for a term of ninety-nine years, upon certain trusts, which have also ceased and determined; and subject thereto, to the said *Moses Steele*, his executors, &c. for a term of two hundred years, upon trust, to raise the sum of 200*l.* for the younger children of the said marriage, and which has also determined; and subject thereto, to the use of the first son of the body of *John Galley* upon the body of the said *Ann Steele*, his intended wife, lawfully to be begotten, and for default of *such issue*, then to the use and behoof of the second, third, fourth, fifth, and all and every other the son and sons of *John Galley*, on the body of *Ann Steele*, lawfully to be begotten, severally and successively, one after another, in order and course as they shall be in seniority of age and priority of birth, and of the several *heirs male* of *their* several and respective bodies lawfully to be begotten; the elder of such sons, and the heirs male of his body, being always preferred before the younger, and the heirs male of his and their body and bodies. And for default of such issue, then in case *Ann Steele* should happen to be *enceinte* with child or children by *John Galley* at the time of his death, then to the use of *Thomas Podmore* and his heirs, until *Ann Steele* should be of such child or children delivered, or die, in trust for such after-born child or children; and if such after-born child or children should happen to be a son or sons, then to the use of such after-born son and sons severally and successively as they should be in priority of birth, and the *heirs male* of the body and bodies of such after-born son and sons, the elder, and the heirs male of his body, being preferred before the younger of them, and the heirs male of his and their body and bodies; and for default of such issue, with remainder to the use of all and every the daughters and daughter of *John Galley* upon the body of *Ann Steele*, lawfully to be begotten, and their several and respective heirs, share and share alike; and for default of such issue,

with remainder to the use of *John Galley*, his heirs and assigns for ever."

*John Galley* and *Anne Stock* afterwards intermarried; and *John Galley* died on the 12th April, 1791, and left *John Galley*, since deceased, his eldest son of that marriage, and several younger children.

The question for the opinion of the Court was—what estate did *John Galley*, the eldest son of *John Galley*, the settlor, take under the limitations in the marriage settlement of the 23d May, 1758?

The case came on for argument, in the last Term, when

Mr. Sergeant Beaumont for the plaintiff.—*John Galley*, the son, took an estate for life only. There are no preceding limitations of an estate of inheritance before the limitation to the first son of *John Galley*, the settlor. Whatever the intent of the parties to the settlement might be, no estate of inheritance can pass or be conveyed under a deed, unless words of inheritance be expressly employed; and this objection is not cured by terming it a slip or omission in the framing or drawing of such an instrument. It must be observed, that the present question arises on a settlement by deed, and not on a devise; and in *Lord Paget and Asterton's case* (a), where there was a grant of estovers to *B.*, to be burnt in his house, and that *B.* and his heirs might take them at certain times of the year—it was adjudged, that this was but an estate for the life of *B.*, because the word "heirs" was not in the grant itself, although it was in the sequel of the deed:—and there is no distinction between a deed to uses, and a common law conveyance in this respect; for in *Abraham v. Twigg* (b), it was held, that although an estate was limited by way of use, it differed not from other gifts by deed, and should not have any other construction. Although in *Leigh v. Brace* (c) it was held

(a) 1 Leon. 2.

(b) Cro. Eliz. 478.

(c) Garth. 343.

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that a conveyance by way of use should be construed like a will, *viz.* according to the intention of the parties, yet in *Tapner d. Peckham v. Merlott*, Lord Chief Justice *Willes*, in delivering the judgment of the Court, said (a), "As to what was insisted upon, that a conveyance to uses is to be construed as a will, and in a different manner from other conveyances, we are all clearly of a contrary opinion. For, since the statute of uses, an use is turned into a legal estate to all intents and purposes; it must be conveyed exactly in the same manner, and by the same words; and if it were otherwise, as most conveyances are now made by the way of use, endless confusion would ensue." And in treating of the case of *Leigh v. Brace* his Lordship said, that it was more largely and particularly reported in 5 *Modern* (b), where not one word was said of any difference between a conveyance by way of use, and any other conveyance; and that if it had been as *Cartew* had reported it, yet it was a single case, contrary to reason and common experience; and such a determination would make such a confusion in all the property of the people of this kingdom, that he should have no regard to it, but thought that the contrary ought to be declared to be law. In *Doe d. Mussell v. Morgan*, Lord *Kenyon* said (c), "certain technical expressions were formerly adopted for the creation of particular estates; and those being well understood, it seldom happens that others less definite are substituted in their room. Soon after the statute of uses, an attempt was made to introduce a different construction on deeds to uses from that which was put on common law conveyances; but that attempt failed of success; and the same rule of construction applies to both." And again, in *Alpass v. Watkins*, his Lordship said (d), "a deed to uses must be construed like a common law conveyance." In

(a) Willes, 180.

(b) Page 266.

(c) 3 Term Rep. 765.

(d) 8 Term Rep. 519. .

*Gough v. Howard*, Mr. Justice Croke said (*a*), "A man devises *Black Acre* to his eldest son, to him and his heirs, and *White Acre* to his younger son, omitting these words, "to him and to his heirs;" this omission is in law as a direct negation, that he should not have it in the same manner as the other had *Black Acre*." It therefore follows, that no estate of inheritance can pass under a deed, or even by will, unless words of inheritance be used by the grantor or devisor; and here the limitation is "to the use of the first son of *John Galley* on *Ann Steele* his wife, lawfully to be begotten; and for default of *such issue*, then to the use of the second, third and other sons of *John Galley*, severally and successively, and the several heirs male of their bodies." There are no words of inheritance which can extend to the first son; and if so, he can only take an estate for life, although estates of inheritance are limited to the second and other sons. The words "for default of *such issue*," can only apply to the first son, as there is no other antecedent to which the word *such* can refer: and in *Hay v. The Earl of Coventry* (*b*), where an estate was limited by will to *A.* for life, remainder to his first and other sons in tail male, remainder "to the use of all and every the daughters, &c., as tenants in common; and in default of *such issue* to the use of the right heirs of the devisor;" it was held, that after the death of *A.* without any son, an only daughter took only an estate for life. There the case of *Evans d. Brooke v. Astley* (*c*), was relied on, where an estate in tail male was expressly limited to the three first sons of the devisor's sister, and in default of *such issue* to every son, &c., it was held, that the fourth son took the same estate as the three others, in order to effectuate the devisor's general intent, but Lord *Kenyon* observed, that there, the estate was limited in formal terms to the three first sons of the devisor's sister, and to

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(*a*) 3 Bulst. 127.

(*b*) 3 Term Rep. 83.

(*c*) 3 Burr. 1570.

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*the heirs of their bodies*; and in the limitation to the fourth son, these words were omitted; but afterwards, when the devisor was directing what was to be done in conformity to his will, he took it for granted that an estate of inheritance was given to the fourth son; for he directed the sons of that fourth son to take his name and arms. And his Lordship further said, that the case before him was precisely similar to that of *Denn d. Briddon v. Page*(a), where the words were, (after a devise to *S. Nash*, son of *T. and M. Nash*, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *S. Nash*, and the heirs male of his and their bodies respectively), “and for default of such issue, then to the use of all and every the daughter and daughters of the said *T. Nash*, on the body of the said *M.* his wife begotten and to be begotten, and *for default of such issue*, to the use of the right heirs of the said *T. Nash* for ever:”—the Court held, that sufficient did not appear on the face of the will to warrant them in saying, that an estate of inheritance was given to the daughter: that, if it were left to conjecture, they might suppose that some mistake had been made in the limitation; but they could not determine on conjecture, nor put that in the devisor's mouth which he had not said. In *Doe d. Comberbach v. Perryn*(b), where an estate was devised to *B.*, the wife of *A.*, for life, remainder to trustees to preserve contingent remainders, remainder to the children of *A.* and *B.* and *their heirs for ever*, to be divided among them equally, and if but one child, to such only child, and his or her heirs for ever, and *for default of such issue*, remainder over:—it was held, that the words “*for default of such issue*,” meant, “*for default of such children*.” Although in *Evans v. Astley*, Mr. Justice *Wilmot* said(c), that “*for want of such issue*, means *for want of heirs male of the body*, and that this is the true construction;” yet

(a) 3 Term Rep. 87, n.      (b) 3 Term Rep. 484.      (c) 7 Burn. 1582.

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there the reason of the case required it, as there was a long succession of devisees, and also an antecedent to which the word *suez* might be applied. Besides, that was the case of a will, and not of a deed, and therefore distinguishable from the present. So, in *Doe d. Willis v. Martin* (a), it was determined that the words, to the use of all and every the child or children of a marriage equally, share and share alike, if more than one, as tenants in common, and not as joint tenants, and if but one child, then to such only child, his or her heirs or assigns for ever, should be construed so as to create an estate in fee in all the children, the words, ‘his or her heirs,’ being allowed to operate as words of limitation on all the preceding words in the sentence. And although in *Ouses v. Sangth* (b), it was held that a limitation in a deed, to the use of *A.* for life, with remainder to the *first son of the body of A.*, lawfully issuing, and *for default of such issue*, to the second, third, and other sons of *A.*, and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gave an estate in *tail male* to the first son of *A.*: yet it was plain to demonstration, on the face of the feoffment, that it was the intent of the parties, that an estate tail should be limited to the eldest son. But the intent did not rest on the first expressions; as the other part of the deed, respecting the trusts and other limitations, referred to an estate tail in the first son of the settlor, as the limitation was to the several heirs male of the body and bodies of all and every such son and sons respectively issuing. Here, however, there is no limitation to the first son, so as to give him an estate tail, as the relatives *they* and *their*, viz. “in order and course as *they* shall be in seniority of age and priority of birth, and of the several heirs male of *their* several and respective bodies,” can only relate to the second and other sons; and whatever implication may be raised in

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a will, in favour of the intention of the testator, the Court will not give an estate tail, by implication, under a deed, as no latitude of construction, or conjecture as to intent, can be allowed in an instrument of the latter description, beyond the precise meaning which the particular words used in the limitation import.

Mr. Serjeant *Peake*, *contra*.—The case of *Owen v. Smyth* is expressly in point, and decisive of the present, and there can be no doubt but that it was the intention of the settlor that an estate tail should be limited to his eldest as well as his other sons, although by some slip or blunder the usual words are omitted; if the words, “and in default of issue,” or “his heirs,” had been added, all possible doubt would have been removed. It is a well known and established principle, that where the intent of the parties to a deed to uses, can be clearly collected from the deed, itself, the instrument shall be so construed as to effectuate that intent. So, in deeds which are obscure, if the Court can see on the face of the whole of the instrument taken together, that the intention of the grantor or settlor is different from what it appears to be if part only be read, the Court will look at the four corners of the deed, and construe it accordingly; as in the case of a covenant for title, or quiet enjoyment, which, if taken *per se*, might be express against all persons and all acts, but which might be restrained by a subsequent covenant to the act of the party himself; and although it might be declared on as a general and unqualified covenant, and against the acts of all the world, yet if coupled with other restraining covenants, it must be confined to the acts of the covenantor alone; and here, enough appears on the face of the deed to inform the Court of the intention of the settlor. In *Doe d. Willis v. Martin*, where a question arose on a marriage settlement, the Court held, that the words “his or her heirs,” might, considering the whole of the

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terms of the deed, and the manifest intention of the parties, act as words of limitation on all the preceding words in the sentence, and that by putting certain stops, or using a parenthesis, they might be taken to apply to the heirs of all the children, although the words in the deed were "to the use of all and every the child or children, equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint tenants, and if but one child, then to such *only child, his or her* heirs or assigns for ever;" and the Court construed these words thus, *viz.* "to the use of all and every the child or children equally, share and share alike, his or her heirs or assigns for ever." So here, it is quite clear, that the settlor intended that the estate should go in succession from his eldest son and his heirs male, to his second, third, and fourth, &c.: and in *Hay v. The Earl of Coventry*, Lord *Kenyon* said (*a*), that the rule adopted by Lord *Hale* in determining a question of this nature, was "*noscitur a sociis*"; and in *Lady Dacre v. Doe* in error (*b*), his Lordship again adopted that rule as applicable to the construction of wills: *viz.* that one clause or provision must be construed with reference to others which may be found in the same instrument, and from which a meaning may be given to the whole: and if the argument for the plaintiff in the construction of this deed were to prevail, if the settlor had no child living at the time of his death, but one were born the day after his decease, he would take an estate tail, whereas, if born in his life-time, such child would only take an estate for life. The words in the limitation being, "to the use of the second, third, and other sons, and the several heirs of *their* bodies, it may be difficult to say, that they refer to the first or eldest son; but the concluding words, *viz.* "the elder of such sons, and the heirs male of his body, being always preferred before the younger," are referrible to all

(*a*) 3 Term Rep. 87.

(*b*) 8 Term Rep. 116.

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the sons; and although the word *such* generally refers to the last antecedent, yet it is not necessarily confined to it, and more particularly so, where the whole of the deed shews a contrary intent; and the case of *Owen v. Smyth* warrants this construction: and Lord Chief Justice *Eyre* there said, "that it was the intent of the parties, that an estate tail should be limited to the eldest son, and that no man could read the deed without seeing such intent, although, by some strange blunder, the usual words were omitted." That is directly applicable to the present case, for the word *such*, at the commencement of the clause, is wholly inconsistent with the other terms of the settlement, which was framed in precisely the same terms as that in *Owen v. Smyth*. In *Evans v. Astley*, there was a devise to the three sons of *C. D.* successively, in tail male, remainder to every son and sons of the said *C. D.*, which should be begotten on the body of *Sarah*, his wife, and for want of such issue, to *W. H. &c.*, with a proviso, that the devisees and their descendants should take the surname and arms of the testator; and it was resolved that the after-born sons took several estates in tail male in succession, as the words "for want of such issue," must be construed, for want of heirs male of the body, in order to effectuate the general intent of the devisor: and the ground of that decision was explained by Lord *Kenyon*, in *Hay v. The Earl of Coventry*. In *Comyn's Digest* (a), it is laid down, that "relative words are generally referred to the next antecedent, where the intent upon the whole deed does not appear to the contrary:" and if so, the word *such* is not, in all cases, to be confined to the last antecedent. As well, therefore, on the construction of the whole of the deed, as on the authority of *Owen v. Smyth*, the eldest son of *John Galley* took an estate of inheritance.

(a) Tit. Parols, (A 14).

Mr. Sergeant *Boucquet*, in reply.—Although it may be collected from the whole of the deed, that the settlor intended to give his eldest son an estate tail, yet as no words applicable to an estate of inheritance are introduced, such estate cannot be conveyed. Although it has been said, that the whole of the deed must be looked at, in order to ascertain what estate the settlor intended should pass to his first son, yet, if that construction were to prevail, as much confusion would arise in questions of title under deeds, as under wills; and the Courts have long since lamented that the same rules of construction had not originally been put on wills as on deeds; and although in cases of contract the whole of the instrument may be looked at, yet the Court will not extend that principle to a conveyance of an estate by deed. It has been said too that the word *suck*, need not be confined to the last antecedent, or that the clause may be read as in *Doe v. Martin*; but in *Hay v. The Earl of Coventry*, Lord *Kenyon* said, “if, indeed, the word ‘*suck*,’ had not been introduced in the clause, we might perhaps have said, that as ‘issue’ is *genus generis maximum*, it should include all the progeny. But that the word *suck* was relative, and restrained the words which accompanied it, and that the objection then occurred, *voluit sed non dixit.*” And in *Owen v. Smyth*, Lord Chief Justice *Eyre* said, “I, for one, adhere to the rule which forbids the raising estates by implication in deeds, and think that we ought not to grant the same indulgence to inaccuracy in the construction of deeds, as we do in wills. But here it is not necessary to resort to implication, or to enquire whether the same latitude is to be allowed to conveyances to uses, as to wills, as there are strict technical words capable of being applied to the first son, so as to give him an estate tail.” But here it is quite clear, that the words *they* and *their* apply to the same persons, *vis.* the second and other sons; and more especially so, as they were not to take as tenants in common, but severally and

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successively, according to seniority of age, and priority of birth; and the word "*such*" in the former part of the limitation, can only refer to the first son, who consequently took an estate for life only.

The following certificate was afterwards sent:—

This case has been argued before us, we have considered the same, and are of opinion, that *John Galley* the eldest son of *John Galley*, the settlor, took an estate tail under the limitations in the marriage settlement of the 23d *May, 1738.*

W. D. BEST,  
J. A. PARK,  
J. BURROUGH,  
S. GASELEE.

*Jan. 26th.*

**BATES v. TURNER, Gent., One, &c.**

THE defendant being indebted to the plaintiff in the sum of *2l. 13s.* for work and labour, the latter, on the 19th *July, 1824*, entered a plaint in the Court of Requests for the manors of *Sheffield* and *Ecclesall*, in the county of *York*(a); upon which the defendant was summoned to appear in that court, on the 29th: on which day the plaintiff attended, and withdrew his plaint. On the 27th, however, the defendant sued out a writ of *accedas ad curiam* *Sheffield* and *Ecclesall*, to the Court of *Common Pleas*, and he demanded a declaration before the return of the writ, the Court set aside the proceedings with costs.

(a) The Court was established by the statute 29 *Geo. 2*, c. 37, for the recovery of debts, within the manors of *Sheffield* and *Ecclesall*, not exceeding 40*s.*, and the power of the Court was afterwards, by statute 48 *Geo. 3*, c. 103, ex-

tended to the recovery of debts not exceeding 5*l.*; and by the 34th section of the latter statute, it was enacted, that no privilege should be allowed to exempt any attorney, &c. from being sued in that Court.

to remove the proceedings into this Court, and, before the return of that writ, had proceeded to demand a declaration.

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Mr. Serjeant *Wilde*, in the last Term, obtained a rule calling on the defendant, to shew cause why, under the above circumstances, the demand of declaration and all other proceedings in this cause should not be set aside with costs.

Mr. Serjeant *Vaughan* now shewed cause, on an affidavit which stated that the writ of *accedas* was sued out by the defendant, on the 27th of *July*, and that the plaintiff had attended at the Court of Requests on the 29th with his witnesses, for the purpose of proceeding in the suit, when, finding that the defendant had sued out an *accedas ad curiam*, he withdrew his plaint. The learned Serjeant submitted, that as the plaint had been previously removed from the court below by the defendant, the plaintiff could not afterwards withdraw it; the jurisdiction of the Court of Requests being at an end, from the time of the removal of the suit, and the issuing of the *accedas* being the removal.

[Mr. Justice *Burrough*.—The cause is not removed till the writ is returned.]

Mr. Serjeant *Wilde*, in support of the rule.—In *Scott v. Bye* (a), the Court determined that a writ of *false judgment* does not lie from a court of conscience to a superior Court; and here, the plaintiff having withdrawn his plaint, and the defendant received notice of it, he cannot now force the plaintiff on in this Court to pay costs. The writ of *accedas*, although issued on the 27th *July*, was not returnable till the 5th *August* following. The defendant

(a) 9 B. Moore, 649.

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should at least have waited until that day before he demanded a declaration, or put the plaintiff to any expense in coming to this Court; for he would have ascertained by the return, that the plaint was withdrawn, and that all further proceedings were thereby rendered unnecessary.

*Per Curiam.*—This writ should not have been issued. We determined in the last Term, in the case of *Scott v. Bye*, that a writ of *false judgment* will not lie for the removal of a plaint from a Court of Requests into this Court, on the ground that the judgment in the court below was directed by statute to be given “according to equity and good conscience,” and not according to the usual course of proceeding at common law; and here the statute directs that the debtors shall be summoned before the commissioners, who are empowered to give judgment accordingly. The same rule therefore will apply to a writ of *accedas ad curiam*. Besides, the defendant should not have demanded a declaration before the return of the writ of *accedas*, by which he would have found that the plaint had been withdrawn, and that, therefore, all further proceedings were unnecessary.

Rule absolute.

Thursday,  
Jan. 27th.

#### SEAMAN v. PRICE.

Where the plaintiff, having verbally agreed with *J. S.* for the purchase of houses, the defendant agreed, in writing, to give the plaintiff 40*l.* for his bargain, and the conveyance was afterwards made by *J. S.* to the defendant's wife at his request:—*Held*, that the transfer of the bargain so made by the plaintiff with *J. S.* was a good consideration for the defendant's promise, and that a declaration in *assumpsit*, stating the consideration to be, that the plaintiff would relinquish the bargain to the defendant, and afford him an opportunity of becoming the purchaser, and that he had done so, was sufficient:—*Held* also, that the conveyance executed to the defendant's wife, as his nominee, supported an averment that the defendant himself became the purchaser.

one *Joel Emanuel*, for the purchase by him, plaintiff, of three freehold houses, situate, &c., of and from the said *Joel Emanuel*, to be conveyed to the plaintiff, at and for the price of 600*l.* That the defendant was desirous of obtaining the said bargain, and becoming the purchaser of the said houses, instead of the plaintiff; and that there-upon, heretofore, to wit, on, &c. in consideration that the plaintiff at the request of the defendant would sell and give up to the defendant the said bargain, and would suffer and permit him to become the purchaser of the said houses from the said *Joel Emanuel*, instead of him the plaintiff, he, the defendant, undertook, &c. to pay the plaintiff 40*l.*—The plaintiff then averred, that he, confiding in that promise, did sell and give up the bargain to the defendant, and did suffer and permit him to become the purchaser of the houses of and from the said *Joel Emanuel*, instead of the plaintiff; and that the defendant did accordingly become such purchaser, and did take the said bargain and obtain a conveyance to him, the defendant, of the said houses, on the terms aforesaid: and assigned for breach, non-payment of the said sum of 40*l.*—The second count was similar to the first, only stating that the plaintiff gave up his bargain with *Emanuel*, and suffered and permitted the defendant to be accepted as purchaser, and that he became so accordingly. The third count stated, that the defendant had undertaken to pay the plaintiff 40*l.* in consideration of his relinquishing his bargain with *Emanuel*, and suffering the defendant to be accepted as purchaser; and the fourth count alleged that in consideration that the plaintiff would relinquish and give up the said bargain to the defendant, and would give and afford to him an opportunity of becoming the purchaser of the houses, the defendant undertook to pay the plaintiff 40*l.* for the said bargain, and the plaintiff then averred, that he did relinquish and give up the bargain to the defendant, and give and afford him an opportunity of becoming the purchaser of the

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houses. To these were added the common money counts. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at the adjourned Sittings at *Guildhall*, after the last Term, the plaintiff gave in evidence a written agreement, between him and the defendant, which contained the terms as stated in the declaration; but it appeared that the former had entered into no written contract or agreement with *Emanuel*, the owner of the houses, for the purchase of them at 600*l.*; but he proved that, although a mere verbal contract, it had been acted on; and that the defendant had obtained possession accordingly. It also appeared that the premises were conveyed by *Emanuel*, at the request of the plaintiff, and under the direction of the defendant, to the defendant's wife; but the conveyance was not in trust for the defendant, but was made beneficially to Mrs. *Price* herself; and *Emanuel* stated, that he would not have conveyed to her unless at the request of the plaintiff, to whom he held himself bound by his contract. On this evidence it was objected, for the defendant, that this action could not be maintained, on two grounds: *first*, that as the bargain between the plaintiff and *Emanuel* was not in writing, it was void under the statute of frauds, and therefore that the transfer of it to the defendant could form no good consideration for the defendant's promise, inasmuch as it could not be legally enforced against *Emanuel*; and *secondly*, that the evidence did not support the declaration, as it was alleged that the defendant himself became the purchaser; whereas, the legal conveyance was not executed to him, but to his wife, who was not even a trustee for the defendant. His Lordship, however, was of opinion that all the counts of the declaration were substantially supported, and that, as to the first objection, the plaintiff had brought himself within the statute of frauds, the agreement on which he founded his action against the defendant being in writing; that if *Emanuel* had refused to

convey, there might have been a valid defence; but that the defendant having derived all the advantage intended by the bargain, he could not be afterwards permitted to say, that what he agreed for with the plaintiff was of no value; and, as to the second objection, his Lordship thought that as the defendant had, in substance, become the purchaser of the premises, he had the entire benefit of the bargain by the conveyance to his wife, as his nominee, and which conveyance was procured for the defendant through the means of the plaintiff. The Jury found a verdict for the latter; damages, 40*l.*

Leave being reserved to the defendant to move that this verdict might be set aside, and a nonsuit entered, in case the Court should be of opinion that either of the objections raised for the defendant was well founded:—

Mr. Serjeant *Pell* now moved accordingly, and submitted, in the *first* place, that the plaintiff had no interest in the houses in respect of which he could enter into a contract with the defendant, as the bargain or agreement for the purchase between the former and *Emanuel* had not been reduced into writing. *Secondly*, the consideration for the defendant's promise, is stated in all the counts of the declaration, to be founded on the plaintiff's giving up or relinquishing his bargain; whereas, there was no bargain he could give up; and even if there had been, it was not binding on *Emanuel*, and consequently was no consideration at all. *Lastly*, the declaration states, that the defendant became the purchaser of the houses, when, in point of fact, he was not so, as the conveyance was executed to his wife, absolutely, and not as a trustee for her husband..

Lord Chief Justice *BEST*.—There can be no doubt as to the justice of this case, when the facts are fully considered. The plaintiff made a bargain with *Emanuel*, for the purchase of the houses in question for the sum of 600*l.*

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SEAMAN  
" PRICK."

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SEAMAN  
v.  
PRICE.

The defendant, being desirous of having the bargain, offered him 40*l.* for it; the plaintiff accepted the offer, and a contract in writing was accordingly entered into between him and the defendant; but as there was no previous written contract between the plaintiff and *Emanuel*, it has been contended that there was no good or legal consideration for the agreement entered into between the plaintiff and defendant. *Emanuel* made no objection to the performance of his contract or bargain with the plaintiff, or to the agreement made by the latter with the defendant, but, on the contrary, allowed the wife of the latter, as his nominee, to take possession of the premises. He therefore had the opportunity of becoming the purchaser, and should not be afterwards allowed to take advantage of such objections as have been now raised. A moral obligation is a sufficient consideration on which to found an *assumpsit*, and more particularly so, if it be productive of advantage to the party to whom it is made: and here *Emanuel* conveyed the premises to the defendant's wife, at the express request of the plaintiff; and *Emanuel* stated that he would not have assigned them to her but for such request, as he held himself bound by his contract with the plaintiff. Although it has been objected, that none of the counts in the declaration can be supported, the fourth was clearly proved, and is of itself sufficient to entitle the plaintiff to recover; as it is therein alleged, that he relinquished his bargain, and gave the defendant an opportunity of becoming the purchaser. He had in fact given him that opportunity, and was consequently entitled to the sum agreed to be paid to him by the defendant; and I, therefore, see no reason to disturb this verdict.

The rest of the Court concurring,

Rule refused.

1825.Thursday,  
Jan. 27th.

An agent or servant can only act within the scope of his authority: therefore, declarations made by him as to a particular fact, are not admissible in evidence, unless they fall within the nature of his employment as such agent or servant.

## SCHUMACK v. LOCK.

THIS was an action of special *assumpsit*. The first count of the declaration stated, that in consideration that the plaintiff had permitted the defendant to deposit certain mud or soil on a rope-walk belonging to the plaintiff, the defendant undertook to remove it on being requested so to do. Breach for not removing. The second count was for not removing it within a reasonable time.

At the trial, before Mr. Justice Park, at the last Assizes for Surrey, it appeared, that the plaintiff's rope-walk abutted on a mill stream belonging to the defendant, the mud of which, on cleansing the stream, had been deposited on the plaintiff's land; that the plaintiff some time afterwards required it to be removed, as it rendered his rope-walk nearly useless; which requisition not being complied with, the present action was commenced. That the defendant's foreman had previously asked and obtained the plaintiff's permission to throw the mud on his land, and that he promised to remove it whenever he should be requested so to do; but the foreman having died before the commencement of the action, the plaintiff, in order to shew that he was authorised by the defendant to make such a promise, called witnesses to prove declarations made by a person of the name of *Shepherd*, who acted as clerk to the defendant, and who had the internal management of the mill at the time, as to the directions he gave the foreman for clearing the stream and taking away the mud; but as those witnesses merely proved that *Shepherd* resided in *America Square*, and acted as clerk to the defendant, who had a counting-house there, and that he had given orders for lead and other things necessary for carrying on the business within the mill, the learned Judge was of opinion, that it was not sufficiently shewn that *Shepherd* was authorised by the defendant to give directions to the

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SCHÜMACK  
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Lock.

foreman as to cleansing the stream; and as the plaintiff could furnish no other evidence of a promise by the defendant to remove the mud, a nonsuit was directed.

Mr. Serjeant *Wilde* now applied for a rule *nisi*; that this nonsuit might be set aside, and a new trial granted;—and submitted, that the declarations of *Shepherd* should have been received, or, that at all events, there was sufficient evidence to go to the Jury, of his being authorised to give directions to the foreman as to the removal of the mud, as he had the exclusive management of the mill, and might therefore be considered as the agent of the defendant, and empowered by him to give directions respecting the cleansing of the stream, and more particularly so, as he paid the labourers their wages for so doing, on account of the defendant. He therefore must be considered as standing in the situation of the defendant himself, as he not only conducted the business at the counting-house, but attended daily at the mill; and it was his duty to give directions as well as to the cleansing of the stream as the management of the machinery; and it was unnecessary to call him as a witness, as the directions he gave the foreman might be proved by those who heard him as well as by himself.

Lord Chief Justice *BEST*.—I am of opinion, that the agency of *Shepherd*, as far as regarded the cleansing of the stream, was not established, so as to render his declarations admissible in evidence at the trial. It appeared, that he acted as a clerk to the defendant, who was a miller; and that, independently of such duty, he had given orders as to the articles furnished for the interior of the establishment. The cleansing of the stream and removal of the mud did not fall within the ordinary dealings of the defendant as a miller; and his clerk does not appear to have been authorised by him to make any bargain as to

the terms on which the mud might be placed on the plaintiff's land, or at what time it should be removed. It was merely proved that he was employed within the mill, where he was only authorised to act as the agent of the defendant, or in *America Square*, as his clerk; if so, and the house of the defendant had been out of repair, and the plaintiff's permission had been required to place the materials on his land before the repairs were completed, *Shepherd* would not have been an authorised agent for that purpose, as it would not fall within the scope of his authority, which was confined to the internal superintendence of the mill, and the business of the counting-house.

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v.  
LOCK.

Mr. Justice PARK.—I thought at the trial that this was an extremely clear case. The defendant had a counting-house in *America Square*, where *Shepherd* acted as his clerk. He also gave directions as to the management of the interior of the mill. It was at first proposed to shew that he was a partner with the defendant; but as there was no evidence of that fact, it was contended that he was an agent; but as it was not proved that he was acting within the scope of his authority in giving orders as to the cleansing the stream, or placing the mud on the plaintiff's land, I rejected evidence of his declarations made to the foreman in that respect, and who, in all probability, of himself entered into the engagement or agreement with the plaintiff to remove the mud.

Mr. Justice BURROUGH.—There was no evidence of *Shepherd's* agency *quoad hoc*; and as the defendant allowed the mud to remain on the plaintiff's land after he had notice to remove it, the plaintiff's proper remedy would have been by an action of trespass.

Mr. Justice GASELEE concurring—

Rule refused.

1825.

Thursday,  
Jan. 27th.

*A.* having undertaken to complete the carpenter's work in a house of the defendant, and to find all materials, and being unable to procure timber for that purpose, it was supplied by *B.* on the following undertaking being signed by the defendant:

"I agree to pay *B.* for timber to a house situate, &c., out of the money that I have to pay *A.*, provided *A.*'s work is completed:"—

*Held,* that this was not a collateral, but a direct undertaking by the defendant to pay upon the completion of the work, and that it was immaterial whether the work were done by *A.*, or by another person.

DIXON, Assignee of MOORE, a Bankrupt, v. HATFIELD.

THIS was an action of *assumpsit* for the breach of an agreement. The declaration stated, that at the time of making the promise and undertaking of the defendant, and before *Moore* became bankrupt, it was agreed between one *William West* and the defendant, that *West* should complete certain carpenter's work for the defendant, at a certain house of him (the defendant), situate, &c., and that in consideration that *Moore* would furnish *West* with timber for that purpose, the defendant promised *Moore*, before he became bankrupt, that he would pay him 50*l.*, provided the work were completed by *West*. The plaintiff then averred, that *Moore*, the bankrupt, supplied the timber, and that *West* had completed the work accordingly. There were also counts for goods sold and delivered by the bankrupt to the defendant before the bankruptcy, and the usual money counts. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the sittings after the last Term, the agreement given in evidence by the plaintiff was as follows:—"I, *Richard Hatfield*, (the defendant,) do agree to pay Mr. *J. Moore* 50*l.* for timber to house in *Annett's Crescent*, out of the money that I have to pay *William West*, provided *West*'s work is completed." It appeared, that before this agreement was entered into, *West* had contracted with the defendant to complete the carpenter's work in the house in question, and find all the materials, but that, being unable to provide funds to procure timber for that purpose, it was supplied by *Moore* on the above agreement being signed by the defendant. *West* admitted that he had been paid his demand on the defendant for doing the work; but it was proved for the latter that the whole of the work had not been completed by *West*, but that the house had been finished under the direction of another person. However, it eventually turned

out, that *West* was prevented from completing the work by the act of the defendant himself. Under these circumstances, his Lordship left it to the Jury to consider whether the terms of *West's* contract had been complied with; saying, that if they had been in substance, it would be sufficient; and also, whether the timber had been furnished by the bankrupt on the credit of the defendant, who undertook to pay him 50*l.*, provided the work were completed. The Jury found that the work had been substantially completed, and gave a verdict for the plaintiff.—*Damages, 50*l.**

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DIXON  
v.  
HATFIELD.

Mr. Sergeant *Vaughan* now applied for a rule nisi, that this verdict might be set aside and a nonsuit entered, or a new trial granted; and submitted, in the first place, that, in order to entitle the plaintiff to recover, he should have shewn, as a condition precedent, not only that the timber had been furnished by *Moore* to *West* subsequently to the agreement entered into between the defendant and the bankrupt, but that *West* had completed the work; and more especially so, as *West* was indebted to the bankrupt, some of the timber having been previously supplied by him.—Secondly, by the terms of the agreement, as well as the original contract, it appeared that *West* alone was to complete the work; and if so, the agreement on which the present action was founded, was in the nature of a guarantie by the defendant to pay *Moore* in case *West* failed to do so, and was void by the Statute of Frauds, as there was no sufficient consideration for the defendant's promise expressed on the face of the agreement.

Mr. Justice PARK.—I am clearly of opinion, that there is no ground to induce the Court to interfere, or disturb the verdict found for the plaintiff. It has been admitted, that whether the work had been substantially completed was left to the consideration of the Jury. They found in the affirmative; and it not only appears to me

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that it was properly left, but that they have drawn a right conclusion. It has been said, that the agreement in question was in the nature of a collateral undertaking by the defendant to pay the bankrupt, if he would furnish timber to *West* for the purpose of his completing the work, and, therefore, that the consideration for the defendant's promise should have appeared on the face of the instrument; but I am of opinion that this was not a collateral, but a direct undertaking by the defendant himself, to pay *Moore* when the work was completed. If a person go to a timber merchant, and say that he has contracted with *A. B.* to build a house for him, and that he would pay for the timber furnished to *A. B.* for that purpose, it amounts to an original undertaking, by the party giving the order, to pay, as the timber would be furnished on his own account; but if it were to be supplied for the use of *A. B.*, on the credit of such party, the agreement must not only be in writing, but the consideration for the promise must be expressed on the face of it. Here, however, no credit was given by the bankrupt to *West*, but the defendant agreed, that if he, (the bankrupt), would furnish timber to be used in building the defendant's house, he would pay him 50*l.* for it, when the work was completed by *West*; and if the defendant had given the bankrupt his promissory note payable when the work was completed by *West*, there can be no doubt but that the plaintiff would be entitled to recover, on shewing that the work had been substantially completed.

Mr. Justice BURROUGH.—There can be no question, when the terms of the agreement are looked at, coupled with the proof that the work had been completed, but that the plaintiff was entitled to recover on the counts for goods sold and delivered by the bankrupt to the defendant before the bankruptcy.

Mr. Justice GASELEE.—The defendant entered into a

positive agreement to pay *Moore* for the timber on the work being completed by *West*; and it is not stated in the declaration as a promise or undertaking by the defendant to pay the debt of a third person; but according to the fact, *viz.* that the defendant himself would pay for the timber supplied by the bankrupt for the defendant's house when *West* should have completed the work. No credit was given by the bankrupt to *West*; and even if there had been, the defendant would have been liable, as he undertook to pay for the timber on the completion of the work; and when that was done, the plaintiff might maintain an action of *indebitatus assumpsit* for the timber supplied, and be entitled to recover under the counts for goods sold and delivered. Suppose, previously to the agreement, the defendant had engaged to pay the bankrupt by a bill, to be drawn on him, and he afterwards undertook to pay on the completion of the work; when that was accomplished, the plaintiff would be entitled to recover without having recourse to the bill; and although it has been said, that it was in the nature of a condition precedent, that the work should have been completed by *West*, yet if the defendant prevented the latter from so doing, it was a waiver of the original agreement; and the plaintiff is not to suffer from the misconduct or fraud of the defendant.

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**Lord Chief Justice BEST.**—I fully agree with my learned brothers, that there is no ground to disturb this verdict. The defendant undertook to pay the bankrupt 50*l.* for timber supplied by the latter for his house, on the work being completed by a party who had already begun it. The party who furnished the timber was not bound to see how the work was completed; and I left it to the Jury to say, whether it had been substantially completed; and they found that it had. It, therefore, might have been done by *West* himself, or through his means. Although the

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agreement has been treated as a *guarantie*, there is no ground for the objection, as it amounted to a direct undertaking by the defendant to pay. The main point at the trial was, whether the plaintiff could be entitled to recover, as it appeared that the whole of the work had not been completed by *West*; but as it was proved to have been substantially done, it matters not by whom it was completed; and as the Jury were fully satisfied with respect to the sufficiency of the completion, this rule must be

Refused.

*Friday,*  
*Jan. 28th.*

**SINCLAIR and Another, Assignees of PROCTOR, a Bankrupt,  
v. STEAVENSON.**

Where the defendant, by a deed, in the form of a demise, conveyed certain stock, premises, &c. to B., on condition of his paying certain sum by way of rent, but which in fact amounted to the sum for which the defendant had agreed with B. to sell them to him, and 10*l.* per cent. interest for the time allowed on each payment, and B. was let into possession of the premises and continued therein for four months, when he became bankrupt;—*Held*,

THAT the plaintiff's claim was good, as assignees of *Proctor*, a bankrupt, to recover the possession of the plant of a distillery, which they claimed either as the property of the bankrupt by purchase, or as being in his apparent order and disposition at the time of his bankruptcy, with the permission of the defendant.

At the trial before Lord Chief Justice *Best*, at the Sittings at *Westminster*, after the last Term, it appeared that the defendant, a distiller, residing in *Warder Street, Soho*, being desirous of disposing of the plant and utensils of his distillery, had, in *December, 1823*, offered to sell them to the bankrupt for 1500*l.* That the latter not being then in a situation to raise the sum required, it was agreed between him and the defendant, that he should, on payment of 300*l.* down, and in consideration of certain rents reserved to the defendant, have possession of the property in question for four years; and a deed to that effect, dated, that such deed was unusurous; and that the property passed to the assignees of B., under the statute of *James*, notwithstanding B.'s having obtained possession under the deed, by means of fraud and misrepresentation as to his circumstances.

31st January, 1824, was accordingly executed, and which witnessed; that in consideration of the sum of 300*l.*, paid by *Proctor* to the defendant, and of the rents, reservations and covenants therein contained, the latter demised, leased, and to farm let to *Proctor* the plant and all the coppers, boilers, vats, &c., and fixtures belonging to the premises:— To hold the same to *Proctor* from the 25th *December*, 1823, for four years, he yielding and paying on the 24th *June*, in the first year of the term, to the defendant the clear rent of 210*l.*, and also on the 25th *December*, in that year, 202*l.* 10*s.*; also on the 24th *June*, in the second year, 195*l.*, also on the 25th *December*, in that year, 187*l.* 10*s.*; also on the 24th *June*, in the third year, 180*l.*, also on the 25th *December* in that year, 172*l.* 10*s.*; also on the 24th *June*, in the last year, 165*l.* and also on the 25th *December*, in that year, 157*l.* 10*s.*; clear of all taxes and other deductions, (the whole amounting to 1469*l.* 10*s.* which was the amount of the principal sum originally required by the defendant for the purchase, together with interest thereon after the rate of 10*l.* per cent.) The deed also contained a proviso, that if during the term of the four years the rent should not be paid within fourteen days after either of the days of payment, or *Proctor* should be declared bankrupt, or if he should make default in payment of 49*N.* secured to the defendant by a bill of exchange, drawn by *Proctor* on, and accepted by one *Newson*, and which bill was given for one half of the price contracted to be paid by *Proctor* to the defendant, for the stock of spirits bought by the bankrupt belonging to the defendant, then the whole of the four years' rents were to be considered as presently due, and that it should be lawful for the defendant to re-enter and sell, and dispose of the plant, &c., and that if there should be any residue of the monies to arise from such sale, then in trust for the defendant to pay it over to *Proctor*.—Then followed a covenant by the defendant, that in case of payment by *Proctor* of the above sums or rents, and due ob-

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“  
STRAVENSON.

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STRAVENSON.

servance by him of the covenants in the deed, the defendant, at the expiration of the four years, would assign the plant, &c. to *Proctor*, for his own absolute use and benefit.

The bankrupt accordingly took possession of the premises under the deed, and continued therein until the 5th *May* following, when a commission of bankrupt having issued against him, the defendant took possession of the plant, &c. under the above proviso for re-entry; and the only material witness to prove an act of bankruptcy, before that day, was the bankrupt's own clerk or servant, whose testimony was altogether contradictory and equivocal. The defence relied on was, that the bankrupt had obtained possession of the distillery by fraud, and through the misrepresentation of his agent; and that, if so, the contract between the parties was altogether invalid, and that the property could not pass to the plaintiffs, as his assignees, under the statute of *James*, as being in the possession of the bankrupt as reputed owner, with the consent and permission of the true owner. And in order to substantiate this, it was proved, that the agent represented the bankrupt to the defendant as being a man of property, and referred him to his banker's account, which the defendant did not examine, but which was proved to be false by the banker himself, who was called as a witness, and who stated that the defendant had no effects at his house at the time.

For the plaintiffs, it was insisted, that the deed under which the bankrupt was let into possession was usurious on the face of it, as it amounted to a contract of purchase or an absolute conveyance; and if so, that the defendant could not repossess himself of the property; and that the deed itself was an answer to the fraud.—His Lordship left it to the Jury to say, *First*, whether, from the evidence of the bankrupt's clerk, as connected with other circumstances, he had committed an act of bankruptcy before the day on which the commission was sued out; and said,

that if the bankrupt had become possessed of the property by fraud, it would not pass to his assignees, but that if the deed amounted in terms to a purchase or sale, it was usurious, and would be an answer to the fraud; and that as the defendant could maintain no action upon it, nor repossess himself of the property, the main question was, whether, as the bankrupt had been let into possession under it, and continued to occupy the premises for four months before the commission was issued, he might not be considered as the reputed owner, and in the possession, order and disposition of the property, at the time of the bankruptcy, by the consent of the defendant as true owner, within the meaning of the statute 21 Jac. 1, c. 19, s. 11 (a). The Jury found, first, that the bankrupt had not been guilty of fraud; and secondly, that the deed was usurious; and accordingly gave a verdict for the plaintiffs.

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SINCLAIR  
" STEAVENSON.

Mr. Serjeant *Vaughan*, now applied for a rule *nisi*, that the verdict might be set aside, and a new trial granted, and submitted:—*First*, that there was no sufficient or legal proof of an act of bankruptcy by *Proctor* previously to the day on which the commission was issued, as the testimony of his clerk was not only contradictory, but was unsupported by any other witness:—*Secondly*, that the question of fraud was improperly left to the Jury; and even if the deed were tainted with usury, it would only have the effect of avoiding the contract as between the parties to the instrument; and here it must be considered that the bankrupt obtained possession of the distillery, through a fraud practised by him or his agent in the first instance. He was proved to have been in embarrassed circumstances previously to the commencement of the negotiation, or the execution of the deed; and such property only as he was legally entitled to at the time of his bankruptcy, could pass to the plaintiffs as his assignees under the statute of *James*; and he could not be said to be in possession of the plant with the

(a) See that section, 3 B. Moore, 595.

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—  
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consent of the true owner, if he acquired such possession by fraud or any other illegal means:—that, *thirdly*, the deed was not usurious, as it was merely a lease or demise, and contained no contract of absolute purchase or sale; and even if it had, it would not amount to usury. To constitute the offence of usury, there must be a taking of more than the law allows upon a loan, or for forbearance of a debt; and here it is quite clear that there was no loan, but a mere agreement as to the disposal of the defendant's interest in the distillery. If an article be ticketed at a shop, to be sold for ready money, at 20*l.*, and the purchaser requiring credit, the seller demand 30*l.* if he take twelve months, it would not amount to usury; for in *Spurrier v. Mayoss* (*a*), where on an agreement by A. to purchase houses from B. for 48*l.*. 10*s.*, possession to be given, and 200*l.* paid immediately, and the rest with interest, at *Michaelmas*; but if not then paid, A. was to pay in lieu of interest upon the same, a clear rent of 4*2l.* *per annum*, out of which was to be deducted interest for the 200*l.* paid: it was held, that it was not usurious; and Lord Commissioner *Eyre* there said (*b*) “the whole matter rests upon an executory agreement, depending for the execution of it upon many things which may never take effect; and therefore this sum of 231*l.* 10*s.* may never be a debt, for I do not agree, that after *Michaelmas*, an action of debt would have lain for this; but it must have been upon the special agreement, and must have stated, either that the purchase was completed, or that the party had done every thing in his power to complete it, and to entitle himself to the money. Possession would have followed; but till completion of the title, it was a fair subject of contemplation between the parties.” So here, there was to be no absolute conveyance or assignment by the defendant to the bankrupt, until the last instalment had been paid, *viz.* at the expiration of the four years;

(*a*) 1 Vea. Junr. 527.

(*b*) Id. 531.

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nor was there any loan or forbearance: and in *Floyer v. Edwards* (a), where there was an absolute sale of goods at three months' credit, but the seller stipulated, that in case the money should be unpaid at the expiration of that time, the vendee should allow him one halfpenny an ounce *per month*, till the debt was discharged, which allowance was above the legal rate of interest: it was held, that the contract being a *bona fide* sale was not usurious, as it was not meant to cover a loan, and evade the statute: and where there is neither a direct loan, nor a forbearance, the seller may impose on the purchaser any terms he may think fit. So here, the purchaser was to pay for the plant by half yearly instalments, and no debt was created by either of the clauses of the deed; as, when it was entered into, the payments were altogether executory, and the defendant could not have insisted on the whole amount of the purchase money, until the term agreed on had expired; and therefore the pretence of usury is no answer to the fraud originally practised by the bankrupt, which, if established, is a complete answer to this action: and if the deed be altogether void, the only question that should have been submitted to the Jury, would have been, whether the bankrupt had obtained possession honestly, or by fraud; of that there can be no doubt, and consequently the plaintiffs, as his assignees, were not entitled to recover under the statute of *James*.

**Mr. Justice PARK.**—I am of opinion that there is no ground whatever to disturb this verdict. Whether the bankrupt (*Proctor*) had committed an act of bankruptcy previously to the issuing of the commission, (*viz.* on the 5th *May*), was altogether a matter of fact for the consideration of the Jury; and as it was stated to consist in a denial to creditors, it must have taken place before that day; but the credit due to the witness, who was called to prove that

(a) Cowp. 112.

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fact, was also left to the Jury.—As to whether the plant in question was, at the time of the bankruptcy, in the possession, order and disposition of the bankrupt as reputed owner, by the consent of the true owner, it is a fallacy to suppose it to be necessary to go into *minutiae* of title to property under the statute of *James*. Here, the deed under which the property was conveyed to the bankrupt by the defendant appears to have been duly executed on the 4th *January*, 1824, which was four months before the issuing of the commission, and which deed was founded on a negotiation or agreement that had taken place between the bankrupt and the defendant in the month of *December* preceding. With respect to the question of fraud, although there may be some things morally fraudulent as between two parties, still that may not have the effect of rendering a deed void in point of law; and the facts, as to the misrepresentations of the bankrupt's property, which were disclosed in evidence at the trial, do not amount to such an avoidance in this case. Besides, the Jury have expressly negatived fraud, on the part of the bankrupt, in obtaining possession of the property in question. Whether, therefore, the deed be valid or not, as the bankrupt was let into possession of the plant under it, and so remained for four months previously to the issuing of the commission, he must be taken to have had the order and disposition of it at the time of the bankruptcy, with the consent of the defendant, as the true owner.

Mr. Justice BURROUGH.—I am of the same opinion.

Mr. Justice GASELEE.—Without considering the terms of, or construction to be put on this deed, I am clearly of opinion, that the plant in question must be taken to have been in the possession, order and disposition of the bankrupt, at the time of his bankruptcy. According to the terms of the proviso for re-entry, the defendant was not to resume the

absolute possession of the premises, but to dispose of them by sale, and the overplus arising therefrom, if any, was to be paid to the bankrupt. He therefore was to have all the benefit to be ultimately derived from the property; and as the Jury have found the material facts as to the bankruptcy, and that the bankrupt himself had not obtained possession from the defendant by fraud, the plant was in his order and disposition at the time of the bankruptcy, and consequently passed to the plaintiffs as his assignees.

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Lord Chief Justice BEST.—After what has fallen from the Court, I need only add a few observations. The opinion I formed at *Nisi Prima* is now confirmed; and with respect to the act of bankruptcy there is no doubt. All the collateral facts were left to the Jury, as well as the credit due to the witness who was called to prove the act; and his evidence corresponded with the statement made by the bankrupt himself in his examination before the commissioners. The plant and other property, which form the subject of the present action, were left in the order and disposition of the bankrupt, at the time of his bankruptcy, by the defendant, and if so they passed to the plaintiffs as his assignees. But it was insisted, for the defendant, that the possession by the bankrupt was obtained by fraud. It is difficult to deal with general propositions, and equally difficult to say what the consequence of a fraud shall be, until the nature of such fraud be duly considered and ascertained. Although the bankrupt might have supposed at the time he made the bargain, that he would not be enabled to pay for the plant according to the stipulations contained in the deed, yet that would not prevent the property from passing to him, so as to vest it in his assignees under the statute. If a person order goods to be sent to him at night, and early the next morning commit an act of bankruptcy, he must be taken to have obtained possession of them by artifice or fraud, but if he be allowed to remain in possession four

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months, by the consent or permission of the true owner, his creditors are not to be deprived of the benefit afforded them by the statute, and no case has been carried to so great an extent. I need scarcely consider whether the deed in question were usurious or not: and the case of *Floyer v. Edwards*, to which I adverted at the trial, does not appear to be applicable to the present; the question here is, whether, by the terms of the deed, the letting were not in the nature of a sale, or whether it were not a contrivance to obtain 10*l. per cent.* interest for the forbearance of the payment of the purchase money by the bankrupt, for the space of four years; and if so, I told the Jury, that although the deed might contain a colour for letting the premises, yet that if it were tainted with usury, the defendant could not act under it, so as to entitle himself to resume the possession. They expressly found that it was; and on again looking at it, no doubt can be entertained on the subject. If it be once reduced to a money transaction, and become in the nature of a forbearance of a loan, it falls expressly within the terms of the statute, as was most justly said by Lord Mansfield in *Floyer v. Edwards*, viz. (a) "that where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance be a loan of money, nothing will protect the taking more than 5 *per cent.* and though the statute mentions only 'for loan of monies, wares, merchandizes, or other commodities,' yet any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'" As, therefore, the law and justice of the case appear to be with the plaintiffs, I am of opinion that the verdict found for them at the trial ought not to be disturbed.

Rule refused.

(e) Cwmp. 114.

## SAWARD v. ANSTEY.

1825.  
 Saturday,  
 Jan. 29th.  
 In a declaration  
 on a covenant  
 by the ven-  
 dore to pay  
 certain annui-  
 ties charged  
 on the land, and  
 to indemnify  
 the vendor  
 against any ac-  
 tion, suit, &c.  
 in respect there-  
 of:—breach for  
 non-payment of  
 the annuities,—  
 without alleging  
 that the vendor  
 was thereby  
 damaged; held  
 good on demur-  
 rer, the former  
 covenant not  
 being restrain-  
 ed or qualified  
 by the latter.

THIS was an action of covenant. The declaration stated, that by indenture, bearing date the 5th December, 1820, made between the plaintiff and defendant, after reciting that the plaintiff had lately contracted and agreed with the defendant for the sale to him of several messuages, &c. situate in the parish of *Eastwood*, in *Essex*, and consisting of two farms, called *Westbarrow Hall* and *Eastwood* farms, containing, together, two hundred and thirty-two acres, or thereabouts, charged and chargeable with the payment of four several annuities of 100*l.* each, under the will of *Michael Saward*, the father of the plaintiff; for the sum of 4460*l.*: and also reciting, that by indentures of lease and release, bearing even date with the indenture, and made between *J. W.* of the first part, the plaintiff of the second, the defendant of the third, and *J. A.* of the fourth part, the plaintiff, in consideration of 4460*l.* therein stated to be, (but 270*l.* whereof were not actually) paid by the defendant to the plaintiff, he, the plaintiff, and the said *J. W.* as his trustee, conveyed, and otherwise assured to the defendant, his heirs and assigns, the said messuages, &c., called *Westbarrow Hall* and *Eastwood* farms, to hold the same to the defendant, his heirs and assigns, (subject to the said four several annuities of 100*l.*), to certain uses therein expressed, giving the defendant a general power of disposition over the said hereditaments, subject to such uses; and also further reciting, that the testator, *Michael Saward*, being so entitled to the said messuages, made and published his will on the 28th April, 1815, which was duly executed to pass real estates of inheritance, and whereby he gave and devised to his son, (the plaintiff,) the said two freehold farms, called *Westbarrow Hall* and *Eastwood* farms, with all houses and out-buildings thereon, to hold the same to the plaintiff, his heirs and assigns, upon condition that he and they should pay yearly, during the natural lives of his, (the testator's),

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four daughters, thereafter named, by two equal payments, (that is to say, on the 25th *March* and 29th *September*, the yearly rent or sum of 100*l.*, free from all charges whatever, unto each of his (the testator's) four daughters in his will respectively named and described; and the testator charged the same farms with the payment of the said annuities accordingly; and also further reciting, that it was, on the said purchase, agreed, that the defendant should enter into a covenant for the payment of the said four several annuities of 100*l.* each, and for the indemnity of the plaintiff respecting the same, in the manner thereafter contained:—" It was in and by the said indenture so made between the plaintiff and defendant, agreed, (amongst other things), and the defendant, in consideration of the premises, did thereby, for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the plaintiff, his heirs, executors and administrators, that he, the defendant, his heirs, executors or administrators, should and would, from time to time, and at all times thereafter, well and truly pay, or cause to be paid, unto the person or persons who should, for the time being, be entitled to the same, the said four several annuities of 100*l.*, by the said will of the said *Michael Saward*, deceased; given and bequeathed to his four daughters, and thereby charged on the said farms, called *Westbarrow Hall* and *Eastwood* farms, as therein aforesaid expressed, during the continuance of the same annuities respectively, at such time or times, and in such manner and form as the same were and are by the said will respectively directed to be paid, and should and would, from time to time, and at all times thereafter, save, defend, keep harmless, and indemnify the plaintiff, his executors, administrators and assigns, and his and their lands and tenements, goods and chattels, of, from, and against all and all manner of action and actions, suit and suits, cause and causes of action and suit, and all claims, pretensions and demands whatsoever, for, or on account of the same annuities respectively, or any of them, or

any part thereof, or in any wise relating thereto."—The plaintiff then averred, that although two of the daughters of *Michael Saward*, the testator, were still respectively living, and entitled to the said two annuities of 100*l.* so given and bequeathed to them, and payable as aforesaid, and that such annuities were still in force, assigned for breach, that the defendant had not paid the said annuities so directed to be paid as aforesaid, and that there was then due and owing, and in arrear to them on account of the said annuities, a large sum of money, to wit, the sum of 300*l.*, for a certain time, to wit, one year and a half of the said last-mentioned annuities, and which said sum of 300*l.*, accrued due after the making of the said indenture, contrary to the tenor and effect of the said indenture. To this declaration, the defendant demurred specially, and assigned for causes that the covenant in the indenture in the declaration mentioned, that he, the defendant, his heirs, executors or administrators, should and would pay the annuities, &c., and indemnify the plaintiff from and against all actions, &c., for, or on account of the same annuities, or any of them, or any part thereof, was one entire covenant, and made and entered into for indemnifying the plaintiff against all manner of actions, suits, &c., and all claims, &c., for or on account of the same annuities respectively, or any of them, or any part thereof, or in any wise relating thereto; and that the plaintiff had not, in and by his declaration, sufficiently, or in any manner, shewn, that he was, or in any wise had been damnified by the alleged non-payment by the defendant of the annuities in the declaration mentioned, and alleged to have been respectively due and payable to the said two daughters of the testator, as in the declaration mentioned; and also, that no sufficient breach of the covenant was stated and shewn in the said declaration. The plaintiff joined in demurrer.

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Mr. Serjeant Peake, in support of the demurrer, pre-

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mised, that although special in terms, yet it might be treated as general, as the objection raised to the declaration was on the construction of the covenant therein set out, which must be collected from the whole of the deed in which it is contained, as well as the subject matter of the contract, and relative situation of the parties; and if so, it merely amounts to a covenant of indemnity. The whole consideration for such covenant was the indemnification of the plaintiff, by the defendant, from any action or charge that might accrue to the former on account of the non-payment of the annuities; and the estate being devised by the testator to the plaintiff, on the condition not only that he, but also that *his heirs and assigns*, should pay the annuities, and as he charged the farms in question with such payment, the estate only can be subject to such charge, and not the plaintiff personally, and, therefore, he cannot have been damnified by the non-payment of the annuities. It cannot be contended, for a moment, that the annuitants could have sued the plaintiff, as they had a power of distress on the land, the testator having expressly charged it with the payment of the annuities; nor could they have proceeded against the plaintiff as devisee, as he was not himself personally liable, no charge being imposed on him by the terms of the devise; and as he had sold the lands so made chargeable with the annuities, to the defendant, the plaintiff could not be afterwards damnified by their non-payment. There is a long series of cases as to whether an estate for life, or in fee, pass to a devisee, and which turn on the question, whether the land or the devisee be liable to the payment of charges: and here the only point is, whether the payment of the annuities in question can be considered as a personal charge on the devisee, or as a charge on the land. It is perfectly clear, that it can be on the latter only, as the annuitants have a power of distress given them in case of non-payment, for the lands alone were chargeable. Therefore, considering that there was no personal charge on the plaintiff as devisee by the terms of the will,

and taking the whole of the deed together, it is evident, that the only object of the parties was, to indemnify the plaintiff against any charge which might be made against him in case the annuities were not paid. The defendant covenanted to pay them at such times, and in such manner and form, as the will directed, and to save the plaintiff harmless, and indemnify him from all actions, &c. by which he merely made himself liable to pay the annuities, as the plaintiff himself was bound to pay them; and the annuitants had no remedy against him personally. The covenant to indemnify him cannot be considered as a separate and independent covenant; as the plaintiff could not be individually called on to pay the annuities according to the terms of the will, the defendant did not covenant to indemnify him at all events: and the declaration does not shew that the plaintiff has been actually damaged by the non-payment of the annuities; nor could he have been, as they were a burden imposed on the lands by the devisor himself, under whom the plaintiff obtained possession.

Mr. Serjeant *Bosanquet*, *contra*, was stopped by the Court.

**Lord Chief Justice Best.**—This is an action of covenant for non-payment, by the defendant, of certain annuities: and the question on the construction of the covenant, as set out in the declaration, arises on a clause in a will made by the plaintiff's father, and by which the estates in question were devised to the plaintiff, from whom the defendant has purchased them, and which is recited in the deed containing the covenant, *viz.* “I give and devise to my son all those my two freehold farms, called, &c. &c., to hold the same to my said son, his heirs and assigns, upon condition that he and they shall pay, yearly, during the na-

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tural lives of my four daughters hereinafter named, by two equal payments, *viz.* on the 25th March and 29th September, the yearly rent or sum of 100*l.*, free from all charges whatever, unto each of my four daughters; and I charge the same farms with the payment of the said annuities accordingly." It is clear, that this was in the nature of a rent charge, as the annuities were charged on the land, and not on the person of the devisee; but there was no clause giving a power of distress, yet the statute 4 Geo. 2, c. 28, s. 5, gives a remedy by distress for rents seck, and chief rents, as in cases of rent reserved upon lease; and there can be no doubt but that the charge in question was a rent seck. The plaintiff took possession of the farms in question, under the will of his father, and afterwards sold them to the defendant; and the deed containing the covenant in question was entered into at the time of the sale, in which the defendant, in consideration of the premises, did, for himself, his heirs, executors, administrators and assigns, covenant with the plaintiff, his heirs, executors and administrators, that he, (the defendant), his heirs, executors, &c., should and would, from time to time, and at all times thereafter, well and truly pay, or cause to be paid to the person or persons who should, for the time being, be entitled to the same, the said four several annuities of 100*l.*, by the will of the said *Michael Saward*, deceased, given and bequeathed to his four daughters, and thereby charged on the said farms." Stopping here, it cannot be doubted for a moment but that this is an absolute and positive covenant, and one to which no possible objection can be raised. The plaintiff had a right to sell the estate chargeable with the annuities, and to take a covenant from the purchaser for the due payment of them to the annuitants, and more particularly so, as they were his own sisters, to whom he would be naturally desirous to give every possible security; as, whilst the property remained in his possession, he would

not, from the ties which existed between them, allow them to suffer; but when the estate got into the hands of a stranger, the annuitants might have been compelled to have recourse to dilatory and expensive proceedings, in order to recover their annuities, as the estate might decrease in value, according to the change of landed property; or there might be a bad or insolvent tenant, or the property might be removed from the premises, so as to prevent a remedy by distress;—in either of which cases, the payment of the annuities might have been defeated. It was therefore prudent for the plaintiff to require a personal covenant from the defendant, for the due payment of them thereafter, and he accordingly caused it to be inserted in the deed, which the defendant has himself executed. It has been said, however, that this is not an absolute covenant. I agree, that the subject matter of the contract must be looked at, in order to ascertain the meaning of the parties, which must be collected from the whole of the deed; and although a positive covenant may be sometimes controlled by other clauses, yet the Court will give effect to all the instrument taken together. The latter part of the covenant by the defendant is, that “during the continuance of the annuities, he would pay, or cause them to be paid, at such time, and in such manner as the same were by the will directed to be paid, and should and would, from time to time, and at all times thereafter, save, defend, and indemnify the plaintiff, his executors, &c., from all actions, claims, and demands whatsoever, for or on account of the annuities, or in any wise relating thereto.” It has been supposed, that this clause of indemnity controls the positive terms contained in the previous part of the covenant, as to the payment of the annuities; but if that were so, it would render it wholly inoperative and nugatory; for the plaintiff was never personally liable, and therefore could not be damaged by non-payment; and if so, he, in strictness, could require no such covenant. But it would be a strong thing to say, that the clause of indemnity

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ty should have the effect of getting rid of the whole of the covenant, and more especially so, when it is manifest that such was not the intention of the parties. Although, in *Browning v. Wright* (*a*), where the vendor of an estate, after granting it in fee to *B.*, and after warranting the same against himself and his heirs, covenanted, that, notwithstanding any act by him done to the contrary, he was seized of the premises in fee, and that he had full power to convey the same; and then covenanted that the vendee should have quiet enjoyment; and lastly for assurance; it was held, that the intervening general words, "full power to convey," were either part of the preceding special covenant, or, if not, that they were qualified and controlled by all the other special covenants against the acts of the vendor himself and his heirs; yet there the covenants were preceded by the introductory words, "for, and notwithstanding any thing by the vendor done to the contrary," which words were applicable as well to the covenant in dispute as to that which preceded it, and therefore had an effect. But according to the construction contended for in this case, the former part of the covenant would have no effect whatever; and although the covenant for indemnity were unnecessary, yet *utile per inutile non ritiatur*; and taking the whole of the covenant together, I cannot infer that it was the intention of the parties that the positive covenant for the payment of the annuities should be controlled or narrowed in its operation by the clause of indemnity with which it was connected.

Mr. Justice PARK.—I am of the same opinion. It is evident that the estate was sold to the defendant for a much smaller sum, in consideration of his undertaking to pay the annuities in question.

Mr. Justice BURROUGH.—The estates were devised to

the plaintiff by his father, subject to the charge of certain annuities; and it was part of the special contract on the sale by the plaintiff to the defendant, that the latter should pay them at such times, and in such manner and form as they were directed to be paid by the will; and a covenant to that effect was accordingly inserted in the deed; there is no pretence for saying that such payment was not considered by the parties at the time the contract for the sale was entered into. It was natural for the plaintiff to require such a covenant, in order to protect the interests of his sisters, or to secure them at all events. This, therefore, is not like the case of a covenant for title, which, although general in terms, may be qualified or restrained by subsequent clauses in the same deed, as here there was a distinct and positive covenant for the payment of the annuities, and which, according to grammatical construction, may be considered as absolute.

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Mr. Justice GASELEE concurring—

Judgment for the plaintiff.

WICKES v. CLUTTERBUCK, Esq.

Tuesday,  
Feb. 1st.

THIS was an action of trespass for an assault and false imprisonment. The declaration stated, that the defendant on the 18th *May*, 1822, with force and arms, &c. assaulted, and caused an assault to be made on the plaintiff, to wit, at &c., and then and there caused him to be apprehended and seized, and laid hold of, and to be forced and compelled to go from and out of a certain public road, and king's common highway, situate and being at, &c., in a certain cart, in, through and along, divers public roads,

A magistrate is bound by an erroneous commitment, notwithstanding a previous regular conviction: where, therefore, a warrant of commitment, under the statute 5 Geo. 4, c. 14, for fishing in a private fishery, did not state that the offence was

committed in inclosed ground: Held to be bad, and that an action for false imprisonment was maintainable against the magistrate issuing it. The Court will not grant a new trial on the ground of trifling inaccuracy of the Judge in his direction to the jury, if the verdict appear to meet the justice of the case.

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streets and places, unto, &c. and to be there imprisoned and kept, and detained in prison, for a long space of time, to wit, &c., and at the expiration thereof, to go and be taken from thence unto and into a certain common prison, called the House of Correction, at &c., and to be then unlawfully imprisoned and kept and detained in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of seven days then next following, contrary to the laws and customs of this realm, and against the will of the plaintiff, whereby he was then and there not only greatly hurt, bruised and wounded, but was also thereby greatly exposed and injured in his credit and circumstances. The defendant pleaded Not Guilty.

At the trial, before Mr. Baron *Graham*, at the last Summer Assizes, at *Hertford*, it appeared, that on the 16th *May*, 1822, the plaintiff was fishing in a pond, or reservoir, belonging to the *Grand Junction Canal* Company, which consisted of about sixty acres, and had lately formed part of *Aldenham Common*; that it was surrounded by a fence, except in one part, which was bounded by a turnpike road, on which rails were placed to prevent persons passing along the road from falling in; and that the plaintiff was standing on the road, and fishing with a rod and line, over the railing. On the 17th *May*, the defendant, one of the magistrates for the county of *Herts*, issued his warrant, at the instance of the Hon. and Rev. *W. Capel*, who rented the fishery of the lord of the manor of *Aldenham*, for the apprehension of the plaintiff, which was as follows:

“ County of *Hertford*, to wit:—

To the constables of *Bushy*, in the said county, and also to *Henry Simmons*, especially.

“ Forasmuch as complaint upon oath has been made unto me, whose hand and seal are hereunto set, one of his

Majesty's Justices of the Peace, for the liberty of *St. Albans* in the said county, that *J—Wickes*, of the parish of *Bushy*, in the said county, corn-dealer, did, on the 16th day of *May*, instant, take, kill, or destroy, or attempt to take, kill, or destroy, the fish in a reservoir, in the parish of *Aldenham*, in the said liberty, *being the private property* of the Honorable and Reverend *William Capel*, and without his consent:—These are therefore, in his Majesty's name, to require you, the said constables, and *Henry Simmonds*, or some, or one of you, *to apprehend* and bring before me, or some other of his Majesty's Justices of the Peace for the said liberty and county, the body of the said *J. Wickes*, to answer to the said complaint, and to be dealt with according to law. Given under my hand and seal, the 17th day of *May*, 1822."

In pursuance of this warrant, the plaintiff was apprehended, and brought before the defendant, who convicted him in the penalty of *5l.*, under the statute 5 Geo. 3, c. 14, s. 3 (a), for fishing in inclosed ground. The conviction was as follows:

"Be it remembered, that on the 17th day of *May*, in the third year of the reign of our sovereign Lord, *George*

(a) By which it is enacted, that "in case any person or persons shall take, kill, or destroy, or attempt to take, kill, or destroy, any fish, in any river or stream, pond, pool, or other water, (not being in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to any dwelling house, but shall be in any other inclosed ground, which shall be private property) every such person, being lawfully convicted thereof, by the oath of one or more credible witness or witnesses, shall

forfeit and pay, for every such offence, the sum of *5l.* to the owner or owners of the fishery of such river or stream of water, or of such pond, pool, moat, or other water: and that it shall be lawful to and for any one or more of his Majesty's Justices of the Peace, of the county, division, riding, or place, where such last mentioned offence or offences shall be committed, upon complaint made to him or them upon oath, against any person or persons, for any such offence or offences, to issue his or

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the Fourth, &c., and in the year of our Lord, 1822, at *Watford*, in the liberty of *St. Albans*, in the county of *Hertford*, the Honorable and Reverend *William Capel*, owner of the fishery within a certain pond or pool of water, called the Reservoir, situate in the parish of *Aldenham*, in the liberty aforesaid, comes before me, *Robert Clutterbuck*, Esq., one of the Justices of our said Lord the King, assigned to keep the peace of our said Lord the King, in and for the said liberty of *St. Albans*, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said liberty committed; and upon oath to him by me now here administered upon the Holy Gospels of God, giveth me, the said Justice, to understand and be informed, that on *Thursday*, the 16th day of *May*, instant, at the parish of *Aldenham*, in the liberty aforesaid, *Joseph Wickes*, of the parish of *Bushy*, in the county of *Hertford*, corn-dealer, did attempt to take, kill, or destroy the fish, in a certain pond or pool of water, called the Reservoir, situate in the parish of *Aldenham*, in the liberty of *St. Albans*, aforesaid, (that is to say), by fishing in the said pond or pool of water, called the Reservoir, with a certain fishing rod and fishing line, with intent to take, kill, or destroy the fish preserved therein, without the consent of him the Honorable and Reverend *William Capel*, contrary to the form of the statute in that case made and provided,

their warrant or warrants, to bring the person or persons so complained of, before him or them;— and if the person or persons so complained of, shall be convicted of any of the said offences, before such justice or justices, or any other of his Majesty's justices of the same county, division, &c. by the oath or oaths of one or more credible witness or witnesses, or by his or their own confession; then, and in such case, the party so convicted shall, im-

mediately after such conviction, pay the said penalty of 5*l.* to such justice or justices, before whom he or they shall be so convicted, for the use of such person or persons as the same was thereby appointed to be forfeited and paid unto, and in default thereof, shall be committed by such justice or justices to the House of Correction, for any time not exceeding six months, unless the money forfeited shall be sooner paid.

be the said *William Capel* being then and there owner of the fishery within the said pond or pool of water, called the Reservoir: and the said *Joseph Wickes* not then and there having any just right, or any just, reasonable, or probable claim, or cause, to take, kill, carry away, or destroy any of the fish, or to attempt to take, kill, or destroy any fish in the said pond or pool of water, called the Reservoir, wherein the said fish were attempted to be taken, killed, or destroyed by the said *Joseph Wickes*, as aforesaid, the said Reservoir not being then in any park, or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but then being in other inclosed ground, then and there being private property, in the parish of *Aldenham* aforesaid, whereby and by force of the statute in that case made and provided, the said *Joseph Wickes* hath forfeited for his said offence the sum of 5*l.* to the said *William Capel*, the owner of the fishery aforesaid, whereupon the said *William Capel*, owner of the fishery aforesaid, prayeth the judgment of me the said Justice, in the premises, and that the said *Joseph Wickes* may be forthwith apprehended and brought before me, to answer the said complaint; whereupon, afterwards, to wit, on the 18th day of *May*, in the year aforesaid, he, the said *Joseph Wickes* being by virtue of my warrant brought before me, the Justice aforesaid, at *Watford* aforesaid, in the liberty aforesaid, to answer the said complaint contained in the said information, and having heard the same read, and the said *William Capel* being also present before me, and complaining before me against the said *Joseph Wickes*, of and for the offence aforesaid, and praying that he may be convicted thereof, the said *Joseph Wickes* is asked by me, the said Justice, if he can say any thing for himself, why he the said *Joseph Wickes* should not be convicted of the premises above charged upon him, in form aforesaid; to which he the said *Joseph Wickes* does not make any defence against the

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charge preferred against him; and further, on the 18th day of *May*, in the third year aforesaid, at *Watford* aforesaid, in the liberty aforesaid, *Thomas Harrison*, a servant in the employ of the *Grand Junction Canal Company*, a credible witness, cometh before me the said Justice, in his proper person, and before me the said Justice, *to wit*, on the said day and year last aforesaid, at *Watford* aforesaid, in the liberty aforesaid, being duly sworn touching the premises, upon the Holy Gospels of God, upon his corporal oath, to him the said *Thomas Harrison* then and there administered by me the said Justice, (I the said Justice having then and there full power and authority to administer the said oath to the said *Thomas Harrison*), deposeth, swear-eth, and upon his oath aforesaid affirmeth, and saith in the presence of the said *Joseph Wickes*, that on the 16th day of *May*, in the year aforesaid, he saw the said *Joseph Wickes*, in the parish of *Aldenham* aforesaid, in the liberty aforesaid, attempt to take, kill, or destroy the fish in a cer-tain pond or pool of water, called the Reservoir, situate in the parish of *Aldenham*, in the liberty aforesaid, (that is to say), by fishing therein with a certain rod and line, with intent to take, kill, or destroy the fish preserved therein; and that the said pond or pool of water, called the Reservoir, was not then, nor is in any park or paddock, nor in any garden, orchard, or yard adjoining or belonging to any dwelling house, but then was, and is in other inclosed ground, then and there being private property, in the parish of *Aldenham* aforesaid, in the liberty aforesaid; and that the said *William Capel*, then and there was and is the true and lawful owner of the fishery in the whole of the said pond or pool of water, called the Reservoir. And thereupon he, the said *Joseph Wickes*, having heard the said evidence so given against him as aforesaid, is asked by me, the said Justice, if he have any thing to say or prove in answer to such evidence, or to shew why he should not be convicted of the offence above charged upon

him in form aforesaid: In reply to which question, he, the said *Joseph Wickes* made use of these words, "I shall not say any thing until I have seen my attorney;" and because the said *Joseph Wickes* doth not nor can say or prove any thing in his own defence, touching or concerning the offence so charged upon him as aforesaid, or shew why he should not be convicted of the same offence; and inasmuch as the said *Joseph Wickes* has not proved or offered any evidence to prove, nor hath alleged that he had the authority or consent of the said *William Capel*, or of any owner of the said fishery, to take, kill, carry away, or destroy, or to attempt to take, kill, or destroy any fish in the fishery aforesaid, or any just right, or any just, reasonable, or probable claim or cause, or any right or claim whatsoever so to do:—Therefore, it is on the 18th day of *May*, in the third year of the reign of our Sovereign Lord the King aforesaid, at *Watford* aforesaid, in the liberty aforesaid, by me the said Justice adjudged upon the testimony of the said *Thomas Harrison*, a credible witness as aforesaid, according to the form of the statute in such case made and provided, that he the said *Joseph Wickes* is guilty of the offence so charged upon him as aforesaid, and that he the said *Joseph Wickes* be, and is hereby by me the said Justice, convicted of the offence aforesaid, according to the statute aforesaid. And I the said Justice do award and adjudge for such offence, that he the said *Joseph Wickes* hath forfeited the sum of *5l.* to the said *William Capel*, the owner of the fishery of the said pond or pool of water, called the Reservoir, situate in the parish of *Aldenham*, in the liberty aforesaid, to be paid, as the statute aforesaid doth direct.

" Given under my hand and seal at *Watford* aforesaid, in the liberty aforesaid, on the 18th day of *May*, in the year of our Lord 1822.

*Robert Clutterbuck, (L. S.)*

On the plaintiff's refusing to pay the penalty, the de-

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fendant ordered him to be conveyed to *St. Albans* Gaol,  
under the following warrant of commitment.

“Liberty of *St. Albans*, in the county of *Hertford*:

To *Henry Simmonds*, Constable of *Watford*,  
and also to the Keeper of the House of  
Correction at *St. Albans*, in the said  
liberty.

“Forasmuch, as *Joseph Wickes*, of the parish of *Bushy*,  
in the said county, corn-dealer, is convicted before me,  
*Robert Clutterbuck*, Esq., one of his Majesty's Justices of  
the Peace for the said liberty and county, on the com-  
plaint of the Honorable and Reverend *William Capel*,  
and on the oath of *Thomas Harrison*, servant to the  
*Grand Junction Canal* Company, for fishing with a rod  
and line in a pond or pool of water, commonly known  
by the name of the Reservoir, in the parish of *Aldenham*,  
in the said liberty, on the 16th day of *May* instant, the  
right of fishery in the said pond or pool being the private  
property of the Honorable and Reverend *William Capel*.  
And whereas the said *Joseph Wickes* is convicted by me  
the said Justice in the penalty of 5*l.*, and the said *Joseph  
Wickes* refusing to pay the same—These are therefore  
to require you, the said *Henry Simmonds*, to convey the  
said *Joseph Wickes* to the House of Correction at *St. Albans*,  
and deliver him to the keeper thereof; and you, the  
said keeper of the said House of Correction, are hereby  
required to receive the said *Joseph Wickes* into your cus-  
tody, in the said House of Correction, and him safely keep  
for the space of seven days, unless the said penalty of 5*l.*  
shall be sooner paid.

“Given under my hand and seal, the 18th day of *May*,  
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The plaintiff was accordingly confined in *St. Albans*  
Gaol, for seven days, and brought this action for false im-

prisonment; and it was contended at the trial, that he had not been guilty of an offence within the 3d. section of the statute 5 Geo. 3, c. 14; and that the conviction and warrant of commitment were bad on the face of them, as the latter did not state that the reservoir was in inclosed ground; and that it did not appear by the former, that any enquiry was made before the defendant, whether the pond or reservoir were private property, nor to whom it belonged.

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For the defendant, it was submitted, that the conviction was of itself conclusive, as it stated the reservoir to be in inclosed ground, being private property, which was sufficient to bring it within the terms of the statute; and the case of *Brittain v. Kinnaird*(a) was relied on, to shew that the conviction was conclusive evidence of the facts therein stated, and that they could not be controverted.

The learned Baron, however, was of opinion, that the plaintiff had not been guilty of an offence within the 3d section of the statute, as the reservoir in question could not be considered as being in inclosed ground, which must be confined to private property, and that the reservoir could not be considered as a pond or pool. That, notwithstanding the conviction, it was open to the plaintiff to shew to the Jury that the reservoir was not within inclosed ground; and that, if the defendant had not made inquiry as to all the necessary facts previously to the conviction, or if other persons had a right to fish in the reservoir, or if it could not be considered as private property, the case was not within the jurisdiction of the defendant; and that, if so, the plaintiff would be entitled to a verdict. The Jury accordingly found a verdict for him, damages 35*l.* being at the rate of 5*l.* per day, during the term of his imprisonment.

Mr. Serjeant Taddy, in the last Term, obtained a rule

(a) 4 B. Moore, 50; S. C. 1 Brad. & Bing. 482.

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*nisi* that this verdict might be set aside, and a new trial granted, on the grounds:—*First*, that whether the reservoir were in inclosed ground or not, the conviction was conclusive on the face of it; and the plaintiff must be bound by it:—*Secondly*, that the defendant acted within the scope of his jurisdiction:—and *lastly*, that there had been a misdirection by the learned Baron; and that he ought not to have allowed evidence to be received in contradiction to the conviction.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Lawes*, now shewed cause, and submitted, that the verdict was not only right, but must be supported both by law and fact, the plaintiff having wrongfully suffered imprisonment for seven days; and that the damages were extremely moderate. The defendant had been guilty of two distinct acts of trespass, the one for causing the plaintiff to be brought before him under the warrant of apprehension, and the other for having caused him to be imprisoned under the warrant of commitment; and although the conviction might be an answer to the first warrant, yet it cannot be to the second, as they were altogether distinct and unconnected. It appeared that the plaintiff had no previous notice that he was a trespasser, or that he should not fish in the reservoir; and even if he had no right to do so, as the reservoir belonged to the *Grand Junction Canal Company*, and Mr. *Capel* merely rented the fishery therein, he should have brought his action, according to the provisions of the 4th section of the statute, instead of applying to the defendant to grant his warrant for the plaintiff's apprehension. Besides, the nature of the offence for which the plaintiff was to be apprehended, should have been expressed on the face of that instrument:—at all events, the warrant of commitment should have the charge or crime, of which the plaintiff had been convicted, particularly and expressly set forth, and, if not, the defendant was guilty of false imprisonment. In *Hawkins's Pleas of the*

*Crown* (*a*), where that learned writer treats of arrests by public officers, he says, that "it seems to be holden in *Boucher's* case (*b*), that where an officer arrests a man by force of a warrant from a magistrate, *pro certis causis*, without shewing any cause in particular, he cannot justify himself in an action brought against him for such arrest, without setting forth the particular cause in his plea; and yet in that very report it seems to be allowed, that such a general warrant was good; and, if so, it seemed strange that the officer should not be justified, by setting forth the truth of his case; since, if there were no good cause to justify the granting of the warrant, the magistrate ought to answer for it, not the officer." If, in the body of a conviction, a party be stated to have been convicted of one offence, a magistrate cannot afterwards alter it, or cause another or different offence to be inserted; nor can he turn round and protect himself by an *ex post facto* discovery. At all events, the warrant of commitment must not only pursue the conviction in terms, but must also be in strict conformity with it; for in *Rogers v. Jones*, Clerk (*c*), which was an action of trespass and false imprisonment against a magistrate, who had committed the plaintiff for cutting down trees without the consent of the owner, the plaintiff gave in evidence a warrant of commitment, signed by the defendant, and delivered to the constable, on which the plaintiff was taken into custody, and which was framed upon a statute differing from that mentioned in the conviction, inasmuch as the latter appeared to be founded on an offence against the 6th *Geo. 3*, c. 48; and the former was for an offence against the 15th *Car. 2*, c. 2; and the conviction was afterwards returned to, and filed at, the Quarter Sessions: the learned Judge who tried the cause was of opinion that the conviction was not of itself a sufficient justification to the defendant, nor conclusive of the matters therein stated, inasmuch as the plaintiff was

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(*a*) Vol. 2, c. 13, s. 11. (*b*) Cro. Jac. 81. (*c*) 1 Ryan & Moody, 129.

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taken into custody under an improper commitment; whereupon the defendant's counsel proposed to prove that the plaintiff was guilty of the offence of which he had been convicted, so as to protect the defendant under the statute 43 Geo. 3, c. 141, s. 2; but the learned Judge, on the authority of *Gray v. Cookson*(a), was of opinion, that that statute only applied to cases where the conviction had been quashed; and on a motion afterwards for a new trial, on the grounds, *first*, that the conviction, regularly drawn up and filed at the Quarter Sessions, was a sufficient justification to the defendant in a collateral proceeding; and, *secondly*, that the latter ought to have been permitted, under the 43 Geo. 3, to prove that the plaintiff had been guilty of the offence of which he had been convicted, the Court of *King's Bench* refused the application, holding that the magistrate was bound by the *erroneous commitment*, notwithstanding the *regular conviction*; and here the warrant of commitment was not only bad, but varied from the conviction, as it did not state that the reservoir, in which the plaintiff fished, was in inclosed ground, which is the essence of the offence, and for which alone he could have been legally convicted. Although in *Brittain v. Kinnaird*(b) it was decided, that a party is estopped from disputing a fact, if a Justice of Peace have jurisdiction, and provided no defect be apparent on the face of the conviction, yet the terms of the conviction must be pursued in the warrant of commitment, or a party might be charged with an offence which he was not bound by law to answer; or, in other terms, it is a general principle, that a conviction must apply to the same offence as is stated in the commitment, so that, in comparing the two instruments together, it may appear that the party was convicted of the offence for which he was committed. Besides, that case is distinguishable from the pre-

(a) 16 East, 13.

(b) 4 B. Moore, 50; S. C. 1 Brod. & Bing. 432.

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seat, as the proceeding was *in rem*, and there was no warrant of apprehension or commitment, and the conviction was good on the face of it. The statute 5 Geo. 3 applies only to the preservation of fish in ponds and other waters of that nature; and therefore, to constitute an offence within the 3rd section, the taking or attempting to take fish must be in inclosed ground, which shall be *private property*. So there must be a breaking and entering of such ground, to render a party a trespasser, and amenable to the penalty to be recovered by action, according to the 4th section of the statute. But here the plaintiff was standing on the highway; and as he was not committing a trespass on the land, his merely throwing his line into the water did not constitute an offence within the statute, and consequently the defendant had no jurisdiction to convict or commit him. In *Lisle v. Brown* (*a*), it was expressly decided, that a stream of water running by the side of a piece of ground, which is inclosed on every side except that on which it is bounded by the water, is not a *stream in inclosed ground*, within the meaning of the 3rd section of the statute, so as to subject a person fishing therein to the penalty inflicted by that act. Although a warrant for apprehending a party guilty of a misdemeanor may be in general terms, yet a warrant of commitment, after conviction, should state the nature of the offence with precision and certainty; and here the warrant professes to set out an offence, which is, in fact, none, as it is not stated that the plaintiff was fishing in *inclosed ground*. In *Hawkins's Pleas of the Crown* (*b*), it is laid down, that "a constable cannot justify any arrest by force of a warrant from a Justice of Peace, which expressly appears on the face of it to be for an offence whereof a Justice of Peace hath no jurisdiction;" and that learned writer, in treating of the form of a commitment, states (*c*), that "it ought to set forth

(*a*) 1 Marsh, 127; S. C. 5 Taunt. 440.      (*b*), Vol. 2, c. 13, s. 10.

(*c*) Vol. 2, c. 16, §. 16.

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the crime alleged against the party with convenient certainty, otherwise the officer is not punishable by means of such *mittimus* for suffering the party to escape; and this not only holds where no cause is expressed in the commitment, but also where it is so loosely set forth, that the Court cannot adjudge whether it were a reasonable ground of imprisonment." If a conviction, when given in evidence, is to have the effect of protecting a magistrate at all events, it will operate as an estoppel to any imperfections or informalities in the warrants of apprehension and commitment, although, if the party committed had applied for a *habeas corpus*, he would have been discharged out of custody, as the gaoler was not bound to detain him under an insufficient warrant. In *The King v. Corden* (a), the Court thought "that a tight hand ought to be holden over summary convictions, and that it ought to appear that the Justice had jurisdiction, and that convictions ought to be kept to a proper degree of strictness, and not to be made arbitrarily, and without authority." If, therefore, the conviction in this case be bad on the face of it, it is quite clear that it cannot be supported, according to the late decision of this Court in *Cloud v. Turfery* (b); and here the words in the statute are in the alternative, *viz.* a river or stream, pond, pool, or other water; and in the conviction it is stated that the plaintiff was fishing in a pond or pool; nor does it appear to whom the reservoir belonged, or whose private property it was. Mr. Capel, the informant, does not appear to have had any interest in the land or water which covered it; but, on the contrary, it was proved that he merely rented the privilege of fishing in the reservoir. Besides, it might be a free or several fishery; and it is described in the conviction generally as being *the fishery* of Mr. Capel. At all events, it should have been specifically stated who the owner of the ground

was, or on whose land the reservoir was situate, as private property can only refer to inclosed ground; and in *The Queen v. Green* (*a*), it was objected, that the evidence on which the defendant was convicted was not set forth, as it was only said that the witness was sworn *de veritate præmissorum*, without saying what the answer of the witness was; and although it was said that it did appear, from what was sworn, to the Justice, that he was guilty, yet it was answered, that it ought to have appeared to the Court, from the nature of the evidence specially set forth; and they were of that opinion. The conviction, therefore, does not operate as an estoppel for every purpose, and cannot cure the defect in the warrant under which the plaintiff was committed, and which must be taken *per se*, and independently of the warrant of apprehension, as well as of the conviction. Both warrants are open to the same objection, as the offence is not stated in either of them to have been committed in inclosed ground, or as falling within the provisions of the statute, or that it did not amount to a felony within the first section of the act. In *Hill v. Bateman* (*b*), which was an action of trespass and false imprisonment, against a Justice of the Peace, for having convicted the plaintiff for destroying game, it was agreed, that, in actions of that nature, the Justices must shew the regularity of their convictions, and that the informations, &c. laid before them, and upon which such convictions are grounded, must be produced and proved in Court; and in *The King v. Daman* (*c*), a conviction founded on this statute was quashed, as it was not alleged in the information on which the conviction was founded, that the proceeding was at the instance of the owner of the fishery; and the case of *Morgan v. Hughes* (*d*) is conclusive to shew, that a warrant, *per se*,

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(*a*) 10 Mod. 213.

(*c*) 2 Barn. & Ald. 378.

(*b*) 1 Str. 710.

(*d*) 2 Term Rep. 225.

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will not justify a magistrate in committing a party, and that if he grant such warrant without any information, upon a supposed charge of felony, he is liable to an action of trespass; and if a conviction be of itself conclusive, and operate as an estoppel, it will be replete with mischief, as a magistrate may insert an information therein, although none have in fact been taken. Although, by the statute 7 Jac. 1, c. 5, a Justice of Peace is allowed to plead the general issue, and give the special matter in evidence, yet such matter would be no answer to the action, unless it would have been if pleaded before the statute, previously to which, a warrant of apprehension or commitment, if illegal or insufficient on the face of it, would not have constituted a good defence; and although the officer who executed the warrant, was justified under the statute 24 Geo. 2, c. 44, s. 6, yet the magistrate could not protect himself by an improper warrant issued at his instance alone; and in *Massey v. Johnson* (*a*), it was held, that the statute 48 Geo. 3, c. 141, does not extend to the case of a magistrate who, proceeding on mere notice, and without any information sufficient to warrant a conviction, commits a person to prison; and here nothing appears on the face of the warrant of commitment, to shew that the plaintiff had been guilty of any offence over which the defendant had jurisdiction; and in *Hall v. Draeord* (*b*), which was an action of trespass against excise officers, for seizing spirits as forfeited, and they gave in evidence a conviction at the Board of Excise, the Court made strong objections as to its authenticity and legality. And here, as the warrant of commitment was clearly bad on the face of it, it could not be cured by the conviction, and more particularly so, as the plaintiff was apprehended and imprisoned under the first warrant, which is open to the same objection, before the conviction was drawn up.

(*a*) 12 East, 67.

(*b*) 2 Sir W. Bl. 1289, 1333.

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Mr. Serjeant *Taddy*, and Mr. Serjeant *Cross*, in support of the rule, were requested by the Court to confine themselves to the question as to the validity of the warrant of commitment: they submitted, that this embraced a point of considerable importance, not only as regarding the magistracy of the country, but the community at large, and that every intendment must be made in favour of Justices, when they act as such; and if they should be deemed liable for a mere clerical error or defect in a warrant of commitment, few, if any, will be found to act under the commission of the peace. There can be no question, but that the defendant was fully justified in issuing his warrants for the apprehension and commitment of the plaintiff, although he has alleged in his declaration that he was imprisoned without any reasonable or probable cause; but the conviction is of itself a sufficient protection to the defendant; and if the action had been brought against the constable or officer, who executed the warrant, he might have justified under it. But the plaintiff has thought fit to proceed against the magistrate, not on the ground of any illegality in the warrant or conviction, but because he had no jurisdiction to convict. In *Hawkins's Pleas of the Crown* (*a*), it is said, that "if a warrant be for the peace or good behaviour, it is advisable to set forth the special cause upon which it is granted; but if it be for treason or felony, or other offence of an enormous nature, it is not necessary to set it forth; and that it seems to be rather discretionary than necessary to set it forth in any case."—But "that the warrant of commitment ought to set forth the crime alleged, with convenient certainty, as otherwise the officer is not punishable for suffering the party to escape (*b*)."  
 That, however, does not apply to the magistrate, as he was justified, by his own proceedings, in apprehending and convicting the plaintiff. The conviction and warrant of commitment were founded

(*a*) Vol. 2, c. 13, s. 25.

(*b*) Id. c. 16, s. 16.

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on the statute 5 Geo. 3, and the plaintiff was detained in custody for refusing to comply with its provisions, and the conviction alone is a sufficient justification to the defendant in this action, without the production or assistance of either of the warrants, as they were not in issue. The statutes, 7 Jac. 1, c. 5, and 24 Geo. 2, c. 44, must be taken *in pari materia*, as the one allows magistrates to plead the general issue and give the special matter in evidence under it, and the other requires them to be joined, to protect officers acting in obedience to their warrants from being made answerable on account of any defect of jurisdiction in such magistrates; and even if the warrant were perfect, it would afford no ground of justification to the person who granted it, unless he could support his conviction; and it was not necessary to produce it in an action of this description, for if the defendant had justified in a special plea, previously to the passing of those statutes, it would have been sufficient for him to rely on the conviction, and he need not have set out the warrants of apprehension or of commitment, and if so, they need not have been produced in evidence, although he pleaded the general issue. In *Rogers v. Jones*, the warrant of commitment was framed on a different statute from that under which the party was convicted, but here the nature of the offence is recited, as well as that the plaintiff had been convicted in a certain penalty, which is equivalent to a judgment. The warrant of commitment must be taken to be founded on the conviction, and, when that instrument was given in evidence, it was conclusive of all the facts stated in it, and could alone be looked at. If a party be indicted for murder, it is necessary to aver, that he, with malice aforethought, did make an assault, &c., but the warrant of commitment need only state that he had been guilty of murder, without setting forth the nature of the offence, with all the formalities and technicalities which are requisite in the indictment. Here, the commit-

ment related to the same offence of which the plaintiff was convicted, and a commitment reciting the sentence or judgment is sufficient, if it contain the subject matter, without referring to all the material facts, or to the express nature of the offence. The case of *Brittain v. Kinnaird* is decisive to shew, that the defendant had jurisdiction, and that the conviction was conclusive of the facts therein contained. There, the magistrate found that a vessel of a certain description was a boat; if it were not so, he would have had no jurisdiction to convict, and yet it was held, that the owner could not be let into evidence to shew that she was not a boat within the meaning of the statute under which he was convicted. So here, whether the plaintiff had been guilty of an offence within the meaning of the statute 5 Geo. 3, was a question for the defendant alone; and it must be taken that he had ascertained whether the plaintiff had been fishing in inclosed ground or not, before he drew up the conviction; and as it is there stated that he had, it is a complete answer to the plaintiff's right to recover in this action. It was the duty of the defendant to attend to the information or complaint made to him, which need not have been in writing, nor was he bound to record it, but he might thereupon issue his warrant, and direct the plaintiff to be brought before him: and although there may be a clerical error or omission in the warrant of commitment, yet the conviction stands as a *res judicata*, and by which the *locus in quo* has been adjudged to be in inclosed ground, being private property. In *Boucher's* case (a), the Court held, that a magistrate may send for any person to examine him, and is not bound to shew the cause in his warrant, nor is the officer to know the cause, yet that when the party was come before the magistrate and committed to prison, then the cause was discovered; and that the officer ought to shew the cause in his plea. It therefore follows, that if a warrant

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(e) Cro. Jac. 81.

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of commitment be imperfect or informal, the officer who executes, and not the magistrate who grants it, is liable to an action; and the *onus* is thrown on the former to shew a sufficient cause: and even if a warrant of commitment be defective, the defect may be supplied by parol. In *Bracy's* case (*a*), a party was committed by commissioners of bankrupts, and the conclusion of the commitment was, until he conformed himself to their authority; and it was objected, that it should have been until he should have submitted himself to be examined upon interrogatories, according to the intent and meaning of the act; for that being a special authority to commit, the words must be pursued: and Lord Chief Justice *Holt* held the objection to be good; and, an action for false imprisonment being mentioned at the bar, his Lordship said, that there was no colour for such an action, where an officer commits such a mistake or slip. In *Hill v. Bateman*, the magistrate clearly exceeded his jurisdiction, as he convicted a party for destroying game, and committed him to prison; although it appeared that he had goods, which might have been distrained, sufficient to answer the penalty he had incurred. In *Morgan v. Hughes*, no information or complaint had been made before the magistrate. And in *Massey v. Johnson* (*b*), an information on the oath of *T. O.*, on a charge of vagrancy, against the plaintiff, was laid before the magistrate on a certain day, when the plaintiff was examined and heard upon that charge; and the magistrate then made out a warrant of commitment until the next sessions, in which warrant it was wrongly stated that the plaintiff had been charged on the oath of *T. S.*, who negatived having made any such oath; but it was held, that such allegation might be rejected as surplusage; and the magistrate afterwards drew up a conviction, dated on the same day, but which was not exhibited until a month afterwards, at the Sessions: it was held, that this was sufficient evidence of a

conviction connected with the imprisonment, however informally such conviction, or warrant of commitment operating as a conviction, were drawn up: and therefore, that at all events, the magistrate was protected against an action of trespass. Here, however, the conviction contains a sufficient statement of the offence to bring the party offending within the statute:—and in *Gray v. Cookson* Lord Ellenborough said (a), “When a conviction is produced at the trial, as of the date when it took place, it would so appear; and it still comes to the same question, whether the Court, in a collateral enquiry, will look out of the record of conviction for the time when it took place; but I think that we ought to give credit to it. Magistrates were, before the statute 43 Geo. 3, c. 141, protected in an action of trespass by a subsisting conviction, good upon the face of it; and the act meant to protect them still further, to a certain extent, in a case where before they were left unprotected by the quashing of the conviction. Even before this statute, I had always considered that if a conviction were produced at the trial, which would justify the imprisonment, that was sufficient.” And here, as the conviction was good on the face of it, it was conclusive as against the plaintiff, and a complete answer to this action. If so, the learned Judge who tried the cause should not have allowed evidence to be received in contradiction to the conviction; and if the question had gone to the Jury on the informality of the warrant of commitment, the damages would have been trifling, or at all events, by no means so large as those which have been now found, as it was considered that the defendant had no jurisdiction to convict the plaintiff, as the place in which he fished did not appear to be within inclosed ground.

**Lord Chief Justice Best.**—It has been truly said, that this case embraces a question of considerable importance,

(a) 16 East, 21.

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as every thing which concerns so respectable a body as the magistracy of this country is of itself sufficient to render it important. Although Justices of the Peace may not have all the acquirements to be obtained from legal study, it must still be considered that they act for the love of their country, the laws of which must be respected, as well as the persons who administer them. *Summa ratio et sapientia boni civis est, omnes æquitate eadem continere.* Gentlemen acting in the Commission of the Peace are sufficiently protected by the law, unless they act from improper motives; and no criminal proceeding can be instituted against them for a mere error, unless it can be proved that they have acted corruptly; but every intendment must be made in their favour; and if they err, they are entitled to a month's notice of action, during which period they may tender amends to the party injured: and no man can be supposed to have acted from improper or dishonourable motives, by making such tender; he thereby merely admits that he is liable to err, and that he is willing to make reparation. It has been said, however, that this is a mere technical objection, and that the verdict found for the plaintiff might cause an alarm to magistrates, who will not act under the commission, if they are to be deemed liable for trifling errors or defects in their warrants. But it does not appear to me to be a technical objection, or even approaching it; for I am clearly of opinion that the warrant of commitment is bad. It is, therefore, unnecessary to consider the validity of the warrant of apprehension, the conviction, or any other proceeding previous to the warrant of commitment; and if that be defective in itself, it silences the argument, that the objection is of a technical nature. If, indeed, the plaintiff had wilfully trespassed on the land of the owner of the fishery, it would have been a different question. Here, however, the plaintiff has been imprisoned seven days under a warrant of commitment in which no ground is even stated to give the magistrate any jurisdiction, much less to autho-

rise such commitment and imprisonment: if the warrant were bad, and death had been occasioned by its execution being resisted, it would not have amounted to murder. Although the plaintiff has not actually suffered to the amount of the damages found by the Jury, yet it must be considered that he was not only degraded by confinement, but that he must afterwards suffer pain of mind from the recognition of his imprisonment; and therefore the verdict does not appear to me to be unreasonable, or the damages too large.—All the proceedings in this case took place under the statute 5 Geo. 3, c. 14, previously to the passing of which, the property in a fishery was so connected with the freehold, that an invader of its rights was only liable to a civil action, in which the party complaining had a right to recover damages, according to the extent of the injury or wrong done him; but the Legislature, in passing that act, looked rather to the invasion of private property than to the value of the fish. Trout found in a river or stream running through a park or garden are of no greater value than those in a stream running across a common; and yet, if a person be found guilty of taking them in the one, he is liable to transportation, if in the other, to a civil action only. The first section of the statute enacts, "that in case any person shall enter any park or paddock fenced in and inclosed, or into any garden, &c., in or through which any river or stream of water shall run or be, or wherein shall be any river, stream, pond, pool, moat, stew, or other water, and by any ways, means, or device, shall steal, take, kill, or destroy any fish, bred, kept, or preserved in any such river or stream, pond, &c., without the consent of the owner or owners thereof, or shall be aiding or assisting in the stealing, taking, killing, or destroying any such fish, or shall receive or buy any such fish, knowing the same to be so stolen or taken, and being thereof indicted within six calendar months next after such offence shall have been committed, before

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any Judge or Justices of gaol delivery for the county wherein such park, paddock, or garden, &c., shall be, and shall on indictment be, by verdict or confession, convicted of any such offence as aforesaid, the person so convicted shall be transported for seven years." And the third section contains a provision as to persons taking or destroying fish in any river or stream, pond, pool, or other water, not being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but shall be in *any other inclosed ground*, which shall be *private property*; and enacts that every such person being lawfully convicted thereof by the oath of one or more witness or witnesses, shall for every such offence forfeit the sum of 5*l.* to the owner or owners of the fishery of such river or stream of water, or of such pond, &c. &c.", which penalty must either be paid down on conviction, or the party offending must be committed to the house of correction for any time not exceeding six months, unless the money forfeited shall be sooner paid. The essence of the offence therefore is the fishing in a river, pond, or other water in *inclosed ground* and *private property*, and yet nothing of this sort appears on the warrant of commitment. This being a penal statute, requires a strict construction; and the defendant has attempted to justify himself, on the ground that the conviction has stated the offence correctly, *viz.* that it was committed in *inclosed ground*, being *private property*, whilst in the warrant of commitment it does not appear whether the plaintiff were fishing in a stream or pond in *inclosed ground* or not, as it merely states that he was convicted before the defendant, for fishing with a rod and line in a pond or pool of water, commonly known by the name of the Reservoir, the right of fishing in the said pond or pool being the private property of the Honorable and Reverend *William Capel*. If such pond or pool had been on an open common, or contiguous to the sea-shore, it might have been equally *private property*;

and there can be no doubt but that the plaintiff might have fished there with a rod and line, without being subject to a conviction, as such pond might have been accessible to the public at large, and if so, was clearly not within the protection of the statute. He was imprisoned for seven days, not for poaching, for it appears that he was merely angling with a rod and line for his own amusement, and was standing on the highway at the time.

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With respect to the warrant of commitment, it cannot be supported by authority, although it has been contended that the law does not require the offence to be therein stated; indeed, the contrary appears from *Hasokins's Pleas of the Crown* (*a*), where that learned writer, in treating as to what ought to be the form of a warrant of commitment, states what rules are to be observed; one of which is, "that it ought to set forth the crime alleged against the party with convenient certainty, otherwise the officer is not punishable for suffering the party to escape, and that the Court before whom he is removed by *habeas corpus* ought to discharge or bail him; and that this not only holds where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the Court cannot adjudge whether it were a reasonable ground of imprisonment;" and here, for any thing that appears to the contrary in the warrant of commitment, the plaintiff had only been guilty of an offence, for which the owner of the fishery might have had a remedy against him by an action of trespass, for having fished where he had no right. It is, therefore, clear that the warrant is bad upon the face of it, and if so, the plaintiff ought not to have been deprived of his liberty under it. The *Second Institute* (*b*), is a still higher authority in support of this principle, as it is there laid down that "the cause must be contained in the warrant; as for treason, felony, &c., or for suspicion of treason

(a) Book 2, c. 16, z. 16.

(b) Page 52.

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or felony, &c., otherwise, if the *mittimus* contain no cause at all, if the prisoner escape, it is no offence at all, whereas, if the *mittimus* contained the cause, the escape were treason or felony, though he were not guilty of the offence; and therefore, for the king's benefit, and that the prisoner may be more safely kept, the *mittimus* ought to contain the cause." If, therefore, a warrant of commitment be imperfect or inoperative, it may be productive of the greatest mischief, for it would place the officer executing it in jeopardy, as he would be armed with no legal right or authority to take a party into custody under it: indeed, it might even go so far as to affect human life, as it might tend to provoke resistance to the party executing it.

It has been said, however, that although the warrant of commitment may be bad on the face of it, and the officer not justified in acting under it, still that it would not entitle the plaintiff to maintain the present action against the defendant, who issued it, but that his remedy, if any, was against the officer. That, however, is contrary to law and public policy; for by the statute 24 Geo. 2, c. 44, which was passed for the protection of officers acting in obedience to the warrants of magistrates, it was enacted by the 6th section, "that no action should be brought against any constable or other officer, for any thing done in obedience to any warrant of any Justice of the Peace, until demand had been made, according to the formalities required by that statute; and that if, after such demand, any action should be brought against such constable, &c., without making the Justice, who signed or sealed the warrant, a defendant, on the production and proof of the warrant at the trial, the Jury should give their verdict for the defendant, notwithstanding any defect of jurisdiction in such Justice, and that if such action should be brought jointly against such Justice, and also against such constable, &c., then, on proof of such warrant, the Jury should find for such constable, &c., notwithstanding such defective jurisdiction in such

Justice." But the assistance of the Legislature is not required in this case; for in trespass there can be no accessories, but all the parties trespassing are to be considered as principals; as, if an order be unlawful, he who makes it is equally responsible with him who executes it; for in *Rolle's Abridgment* (a), it is laid down, that "if a man command another to beat one, and he do it accordingly, he is a trespasser, as well as he who did it;" and the defendant has been the cause of the injury complained of, by directing the plaintiff to be apprehended and committed under the warrants issued by him; and *Boucher's* case (b) is an authority to shew that an action of trespass for false imprisonment is maintainable against a Justice of the Peace in a case of this description. In that case the defendant justified to such action, that the mayor of *London*, being a Justice of the Peace within that city, commanded the defendant, being a Serjeant of Mace, to imprison the plaintiff; and *Montague*, the then Recorder, defended the officer: but all the Court held, "that although the mayor or magistrate might send for a party to examine him, and was not bound to shew the cause in his warrant, nor was the officer to know the cause, as it might be for treason or felony, which, if discovered, the party might thereby escape, and the examination not made, and justice be thereby defeated, yet, when the party is come before the mayor, and committed to prison, then the cause is discovered; and when a party is impleaded in an action, he ought to shew the cause, otherwise the plea is not good." So here the defendant caused the plaintiff to be apprehended and brought before him in the first instance, and afterwards not only convicted him, but caused him to be imprisoned under a warrant of commitment, which did not disclose the nature of the offence of which he had been convicted, so as to bring it within the terms of the statute.

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(a) Vol. 2, tit. Trespass, (V 2), p. 555.

(b) Cro. Jac. 81.

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Although it has been insisted, that, as the conviction is good upon the face of it, it is sufficient to protect the defendant, still it will not justify him in issuing a warrant of commitment, which does not set forth the offence contained in the conviction. Admitting that the learned Judge who tried this cause was not altogether correct in allowing parol testimony to contradict the co-conviction, yet, if the warrant of commitment be illegal, the plaintiff is entitled to retain his verdict; and if such verdict be supported by fact, and we see that no injustice has been done, there is no substantial ground for granting a new trial. Mistakes must frequently occur at *Nisi Prius*; and, if a cause were to be sent down again for a trifling slip of the Judge, it would be productive of the greatest inconvenience to suitors. And in a cause tried before Mr. Baron *Perry* at *Salisbury*, where part of his direction to the Jury was wrong, the Court refused a new trial, it appearing that justice had been done. It has been also said that the damages in this case are excessive; but, taking the whole of the circumstances into consideration, I am strongly inclined to believe, that another Jury would not give the plaintiff a less compensation than the former.

Mr. Justice PARK.—I so fully agree with what has fallen from my Lord Chief Justice, that I scarcely think it necessary for me to add any remark; but as the warrant under which the plaintiff was committed, was informal, and as it has been truly said, that the case raises a question of such vital importance to the magistrates of the country, I am induced to add a few reasons for my concurrence. I fully agree that penal statutes, giving a magistrate jurisdiction to convict and imprison, ought to receive a strict construction; and the plaintiff has received a most material injury by having been imprisoned, under an informal warrant, for the space of seven days. The objection taken to the warrant does not relate to a mere clerical blun-

der, but is an error in substance; and if the plaintiff had been brought up under an *habeas* he must necessarily have incurred expences; taking the whole of the circumstances together, I am, therefore, not prepared to say that the damages found by the Jury are immoderate or excessive.

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v.  
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The case of *Rogers v. Jones* appears to me to be expressly in point for the plaintiff, and is altogether distinguishable from *Brittain v. Kinnaird*, as in the one the question turned on the form or validity of the warrant of commitment; but in the latter case there was no warrant to apprehend or commit. The subject matter of conviction was a boat; and the Court held that the conviction was conclusive on the face of it as to the facts therein stated; but here the warrant of commitment was produced at the trial, in which nothing appeared to warrant the plaintiff's committal; nor was it shewn that he had been guilty of any offence to render him liable to the penalty, for the refusing payment of which he was imprisoned. If the conviction had been framed in the same terms as the commitment, it would have been clearly bad, and, for any thing that appears to the contrary, there might have been two informations or convictions for distinct and different offences; and although the conviction may be good, it cannot have the effect of supporting a bad commitment. Besides, the commitment does not pursue the conviction, nor does it state that any offence was committed by the plaintiff contrary to the statute, or that it was within the summary jurisdiction of the magistrate, as it did not allege that the pond or reservoir in which the plaintiff fished was in *inclosed ground* being private property; and therefore it did not follow the terms of the conviction: and we cannot intend that it refers to it, particularly when the statute on which it is founded is of so highly penal a nature. The case of *Rogers v. Jones* was tried before me at *Hereford*, and although it differs in facts from the pre-

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sent, it does not in principle. There, the conviction was good upon the face of it, and appeared to have been framed upon the statute 6 Geo. 3, c. 48, and the warrant of commitment charged the party convicted with an offence under 15 Car. 2, c. 2; on which I was of opinion, that he was entitled to recover in an action for false imprisonment against the committing magistrate; and the Court of *King's Bench* afterwards refused to grant a rule for a new trial, on the ground that the magistrate was bound by the erroneous commitment, notwithstanding the previous regular conviction. There, too, it was contended, that the magistrate was protected under the statute 43 Geo. 3, c. 141, but I was of opinion that that statute applied only to cases where the conviction had been quashed; and this opinion was afterwards confirmed by the Court. On these grounds, I think that the defendant must be bound by the defective commitment, although the conviction were regular; or, in other terms that an erroneous commitment cannot support a regular conviction; and consequently that there is no ground to disturb this verdict.

Mr. Justice BURROUGH. — It has been truly said, that this case embraces a question of considerable importance to the magistrates of the country; it is important to point out to them, that in the exercise of a summary jurisdiction they ought to be extremely careful that all their proceedings are correct; and if they have been guilty of any irregularity, or informality, they ought to suffer for the consequences which may arise from it; and more especially so, as they must be taken to be competent to discharge the important duties of the office they have undertaken to perform, particularly in cases where they have a summary jurisdiction given them by statute: and in pursuing the power so entrusted to them, they should be carefully and narrowly watched, as the

party brought before them is entirely subject to their jurisdiction, and deprived of the advantage of a Jury; and I very much doubt whether the statute in question has not gone too far. The plaintiff complains of having been falsely imprisoned; and the question is, by whom. The defendant was the *causa causans*, by issuing the warrants of apprehension and commitment; and the latter does not even state that the plaintiff had been guilty of a misdemeanor, but a civil injury only, and for which the owner of the fishery might have had his remedy by an action at law; and no reason whatever has been assigned why the nature of the offence should not have been pointed out in the commitment, as required by the statute; and it does not even pursue the terms of the conviction. Although, in the case of a common assault, an oral information may be taken, before a magistrate proceeds to commit; yet here it was not only incumbent on the defendant to call the plaintiff before him, but to take the information in writing, so that it might be acted on as in a Court of law. In convictions on the game laws, the informations are always reduced into writing. Here, however, as the warrant of commitment omits the nature of the offence altogether, it is not, as has been contended, a mere clerical error, but is such a substantial defect as renders it altogether void; and, being so, it cannot be cured by the conviction.

With respect to the summing up of the learned Baron to the Jury, if through his misdirection a verdict had been improperly obtained against the facts and justice of the case, there might be ground to set it aside, but it is clear that the plaintiff was entitled to a verdict, as he was imprisoned under an illegal warrant, which was improperly issued at the instance of the defendant; and it was for the Jury to measure the amount of the damages; and although they may appear to be large, yet that, of itself, is not a sufficient ground to induce us to send the cause down to a new trial.

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Mr. Justice GASELEE.—I have entertained considerable doubt during the argument, but fully accede to the principle, that every protection ought to be afforded to magistrates in the exercise of their duty, and if the defect in the warrant of commitment were a mere clerical error, the present action could not have been maintained.

The Court of *King's Bench* have frequently quashed convictions for insufficiency or defects appearing upon the face of them. In *Rogers v. Jones*, it was expressly decided, that where the warrant of commitment differed from the conviction, the latter, though regular, would not protect the magistrate in an action for false imprisonment under such warrant of commitment; and here, on comparing such warrant with the conviction, and the terms of the statute, it is doubtful whether they refer to one and the same offence, and, even if they corresponded, there is no offence substantially charged in the commitment, which, according to reason and policy, should set forth the nature of the offence whereof the party stood charged, or was convicted. At all events, the offence should have been shewn to be within the meaning and terms of the statute, which might have been easily followed, and its words strictly complied with. If not, a conviction might be drawn up contrary to the information; and it is quite clear that a magistrate cannot amend the substance of an information or supply its defects, by a conviction properly drawn up afterwards. Although the case might have been left differently to the Jury, yet as justice appears to have been done, there is no ground for a new trial. It is true, that mistakes must frequently occur at *Nisi Prius*, but here it appears to me that all the facts should have been left to the Jury, and they should not have been misled by the statement that the conviction was not conclusive evidence of the facts contained in it; and if they had considered whether the plaintiff had been guilty of the offence for which he was imprisoned or not, it might have had the effect of reducing the

damages; but as it is not for us to measure them, the Court appears to me to have adopted the better course, although, as all the facts were not pointed out to the Jury, I should have wished the cause to have gone down again. This rule therefore must be

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Discharged.

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**PRATT v. ODDY.**

*Thursday,  
Feb. 3rd.*

**O**N Mr. Serjeant *Vaughan's* moving to justify bail in this cause:

Mr. Secondary *Hewlett*, informed the Court that it could not be done, as the notice of justification was given for yesterday, (being the *Purification* and a *dies non*), and that there ought to have been a continuance of notice for this day.

The time for  
justifying bail  
expiring on a  
*dies non*, the  
Court allowed  
them to justify  
on the following  
day, without a  
continuance or  
notice.

Mr. Serjeant *Vaughan* referred to *Tidd's Practice* (a), where Master *Foster* is stated to have said "that if the time allowed for justifying expire on a day in Term which happens to be *Midsummer-day*, or any other holiday, when the Court does not sit, the notice of justification should be for that day, (being the day they ought to justify), to prevent an assignment of the bail bond; and that the bail may justify the next day, as a matter of course."

The Court, considering that there should be an uniformity of practice in this respect, sent to the Court of *King's Bench*, and on being informed that that Court, under such circumstances, allowed bail to justify on the following day, without a continuance of the notice;—ordered that the bail in this and six other causes to which the same objection appli-

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PRATT  
v.  
QDDX.

ed, might be permitted to justify to-morrow, dispensing with the rule for serving the notice before three o'clock this afternoon, and ordered that no attachment should issue against the sheriff.

*Thursday,  
Feb. 5d.*

Where a plaintiff was nonsuited, in consequence of not producing formal proof of a private act of Parliament, which the defendant's agents had previously agreed should be dispensed with, and the plaintiff obtained a rule to set aside the nonsuit, and have a new trial, which was afterwards made absolute, but was silent as to costs, and the defendant obtained a verdict on the second trial:— Held, that the costs of the application for a new trial not having been inserted in the rule, were to be considered and taxed as costs in the cause.

**TRUSLOVE v. BURTON.**

THIS was an action of trespass, and came on for trial, before Lord Chief Justice Abbott, at Cambridge, at the Summer Assizes, 1823; when the plaintiff, being unable to give formal proof of a private act of Parliament, was nonsuited. But it appearing that the defendant's agents had previously entered into admissions that such proof should not be required, a rule was obtained in *Michaelmas Term*, 1823, calling on the defendant to shew cause why the nonsuit should not be set aside, and a new trial granted, which in the last *Easter Term* was made absolute (a), and a rule was drawn up accordingly, in which no mention was made of costs. The cause was re-tried at the last Summer Assizes, when the Jury found a verdict for the defendant. On the taxation of costs before the Prothonotary, he allowed the defendant the costs of the application to the Court for a new trial, although he had opposed the rule which was made absolute against him.

Mr. Serjeant Pell now applied for a rule to shew cause why the Prothonotary should not be directed to review his taxation, and allow the plaintiff the costs of that application, and submitted, that they could not be considered as costs in the cause, especially as the plaintiff was nonsuited at the first trial, in consequence of the defendant's breach of faith in refusing to admit that which he had previously

(a) See 9 B. Moore, 64.

agreed to do; and, as the plaintiff had succeeded in his application for a new trial, he ought to have the costs of such application allowed him.

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&  
BURTON.

The Prothonotary stating that he had considered those costs as costs in the cause—

The Court said, that they might properly be so deemed, as the defendant had, in point of fact, succeeded at both trials; that the costs should have been engrafted on the rule when the application for a new trial was made; and that, as it was not done, the plaintiff was not entitled to them; and it would be too much to say, that, after having succeeded at the second trial, the defendant ought to pay them. That if an interlocutory motion be silent as to costs, the party who eventually succeeds is entitled to them; and if a rule be improperly drawn up, it cannot afterwards be altered by the insertion of costs. That, therefore, setting aside the breach of faith on the part of the defendant, this case falls within the general rule; and as the plaintiff made no application for costs at the time he applied to have the nonsuit set aside, the costs attending the motion for a new trial must be taken to be costs in the cause; and the Prothonotary has properly so taxed them.

Rule refused.

ROGERS, Administratrix of ROGERS, v. KINGSTON.

Thursday,  
Feb. 3rd.

A RULE nisi had been obtained by Mr. Serjeant Peake, on a former day in this Term, calling on the plaintiff to shew cause why a warrant of attorney, given by the defendant,

An insolvent debtor applied for his discharge under the statute 1 Geo. 4, c. 119, and gave a

creditor, who threatened to oppose him, a promissory note for the amount of his debt, and he accordingly withdrew his opposition, and the insolvent, after his discharge, was arrested on the note, but settled the action by giving a warrant of attorney, for the debt and costs, payable by instalments:—The Court set aside the warrant of attorney, and ordered an instalment paid by the insolvent to be returned to him, on the ground that the note and warrant of attorney were contrary to the policy of the statute, and operated as a fraud on the other creditors.

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 ROCHES  
 v.  
 KINGSTON.

should not be set aside, or delivered up to be cancelled, and an instalment that had been paid thereon returned to him. The motion was founded on affidavits, which stated that the defendant had been indebted to the plaintiff's intestate in the sum of 30*l.* for money lent, and being about to apply for his discharge under the insolvent debtor's act (*a*), and hearing that the intestate intended to oppose it, he sent to him, offering a security for the debt; that his promissory note was thereupon given for 30*l.*, the threatened opposition by the intestate withdrawn, and the defendant eventually discharged; that on the death of the intestate, the plaintiff, as his administratrix, in *July, 1824*, caused the defendant to be arrested for the amount of the note; and that, in order to get rid of the action, he gave her a warrant of attorney for 49*l.*, the amount of debt, costs, and interest, payable by instalments, the first instalment of which, amounting to 5*l.* 19*s.* 4*d.* had been paid to the plaintiff on the 6th *January* last, when it became due.

The learned Serjeant submitted, that this was contrary to the policy of the statute 1 *Geo. 4.* c. 119, as the note was given under duress, and for the express purpose of the defendant's obtaining his discharge, which was a fraud on the general body of the creditors, and was not founded on a moral obligation, and that the warrant of attorney was open to the same objection; and he relied on the case of *Jackson v. Davison* (*b*), where an insolvent debtor, having petitioned the Insolvent Court to be discharged under that act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days after his discharge, a warrant of attorney for the debt, and, in the mean time, to give a promissory note of a third person for

(*a*) 1 *Geo. 4.* c. 119.

(*b*) 4 *Barn. & Ald.* 691.

the amount, which was to be given up on the execution of the warrant of attorney; and the insolvent was discharged, and the warrant of attorney executed on delivering up the note: the Court of *King's Bench* set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the act; inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the Legislature intended to be distributed amongst all the creditors.

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Rogers  
a  
Kingston.

Mr. Serjeant *Wilde* now shewed cause, and insisted, that this case was distinguishable from that of *Jackson v. Davison*, as the ground of decision there was, that the agreement on which the warrant of attorney was founded was contrary to the policy of the statute, as it enabled the creditor to whom it was given to take to himself a portion of the future effects of the insolvent, which the Legislature intended to be distributed among the creditors generally. Besides, there the attention of the Court was only called to the 18th and 25th sections of the statute; but the 17th, 19th, and 28th were equally applicable; and the act is so framed as to give every creditor the means of enforcing the payment of his debt; and when it is satisfied or released, the defendant is entitled to his discharge; if so, a note or other security, given to a creditor who is about to oppose the discharge of his debtor, is neither illegal nor void. Here, the defendant had the opportunity of defending himself in the action brought against him by the plaintiff on the note, and he might have shewn the circumstances under which it was obtained from him by the plaintiff's intestate; and if he gave it under duress, it would have been an answer to the action; instead of which, he offered to pay the amount by instalments, and accordingly gave the warrant of attorney in question as a security for so doing. If he had made a parol promise after his discharge to pay the

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amount of the note, it would have been binding on him, without executing any security for that purpose; and as the warrant of attorney was not given until after the discharge, it must be considered as a new debt; and as the defendant did not avail himself of the defence he might have set up in the first instance, the present application is made too late to induce the Court to interfere in setting aside the warrant of attorney; and more particularly so, as the first instalment was paid without any objection being raised to it. There is a wide distinction between this and the case of a bankrupt, or a debtor who has entered into a general deed of trust for the benefit of his creditors, as there each creditor becomes a party to the instrument, on the faith that the creditors at large had consented to execute it on the same terms, and that they should all stand *in pari materia*, as to the distribution of the effects of their debtor; but where an insolvent seeks to be relieved or discharged under the act, the assignee has no claim on his after-acquired property, as that only of which he was possessed at the time passes by the assignment. Here, in order to invalidate the warrant of attorney, it should be shewn that the promissory note it was intended to secure, was void, either as being founded on an immoral consideration, or in diminution of the funds of the general creditors. But the present application is made at the instance of the defendant himself, and not by his assignee or other of his creditors; and if the plaintiff's intestate had opposed his discharge in the first instance, he might have caused him to suffer two years' imprisonment, under the 18th section of the statute; and here, as the plaintiff did not become a creditor until after the defendant's discharge, the Court will not relieve him, for there was a good consideration for his giving the warrant of attorney, he being morally bound to pay the note it was given to secure.

Mr. Serjeant Peake, in support of the rule, was stopped by the Court.

**Lord Chief Justice Best.**—This is an application, on the part of the defendant, to set aside a warrant of attorney, and that an instalment which he has paid the plaintiff thereon may be returned to him; and which instrument was given under the following circumstances:—The defendant having applied for his discharge under the statute 1 Geo. 4, c. 119, the plaintiff's intestate, being a creditor at the time, threatened to oppose him, in consequence of which threat the defendant was induced to sign a promissory note for the amount of the debt, which was given to the creditor on the express ground that he should not oppose the defendant's discharge; and he was eventually discharged. The creditor, having died intestate, the plaintiff, as his administratrix, sued the defendant on the note; and the action was afterwards settled at the instance of the defendant, on his giving the warrant of attorney in question, as a further or additional security for the payment of the note, as well as the costs of the action brought upon it; but it does not appear that the note was delivered up. It has been said, that the defendant should have availed himself of his defence when the action was brought against him on the note, and that it is now too late for him to apply to the Court, and that we ought not to decide on motion. But this is not an application to stay proceedings in an action; and we shall not prevent the plaintiff from going to a different tribunal, and trying an action on the note; it is never too late to apply to the Court to get rid of a transaction bottomed on, or tainted with, fraud: such an objection can only prevail where an account has been adjusted and settled, or no fraud has been suggested. Here, however, there is a strong suggestion of fraud on the face of the affidavits; and the promissory note given by the defendant was required from him, contrary to the policy of the law; and it therefore cannot be distinguished from the case of a note founded on an usurious consideration, the maker of

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which afterwards gives a warrant of attorney to enter up judgment for the same demand; for here the warrant of attorney was given in consequence of the defendant's settling the action brought against him on the note. Both instruments, therefore, were founded on the same consideration; and if the one be illegal, so is the other; and no subsequent arrangement can make a transaction legal, which was in its origin illegal. I am therefore clearly of opinion, that the application to set aside the warrant of attorney may not only be supported, but that it is not made too late. The case of *Jackson v. Davison* appears to me to be precisely in point; but as the law is a perfect science, I do not feel myself bound to be governed by any previous decision, either of this Court or any other, nor will I act contrary to it unless I am convinced that it was erroneously determined, otherwise we should be continually debating on the same points; and although I concurred with the Court of *King's Bench* in the case of *Jackson v. Davison*, it will not influence me now; and notwithstanding it has been said, that the attention of the Court was not called to all the sections of the statute, yet none appears to me to be applicable to the point before the Court but the 25th, to which Mr. Justice *Bayley* particularly alluded, by which the Insolvent Debtor's Court is authorised to order judgment to be entered up against the debtor for the amount of the debts from which he shall be discharged; and that when the prisoner is of ability to pay such debts, or any part thereof, that Court may permit execution against the property acquired by such prisoner after his discharge, for such sum as, under all the circumstances of such prisoner, the Court shall order; and the sum levied is to be distributed rateably among the creditors. But it has been said, that an insolvent, who applies for his discharge, may buy off a creditor, and that the latter may forbear to insist on his debt; such forbearance, however, cannot be purchased by taking from the body of the creditors a

portion of those funds which the Legislature intended should be distributed rateably amongst all. It is true, a creditor may not oppose his debtor; but if he pretend to do so, he may prevent others from taking the same step; and he cannot withdraw such pretended opposition by taking a security for his own debt, to the prejudice of such other creditors, for it would not only be a fraud upon them, but an immoral and corrupt bargain, and contrary to the policy of the law. The principle laid down in *Jackson v. Davison* is not new, as it may be applied to bankrupts, or debtors who have entered into a deed of composition with their creditors. It is quite clear that a petitioning creditor cannot be bought off; and a security given to a creditor as a consideration to persuade him to sign a bankrupt's certificate, is void. So, where creditors enter into a composition deed, and one of them takes a security for a larger sum than that stipulated to be paid by the deed, such security is void, because the temptation to give it is a fraud on the creditors who were parties to the contract, by which their debts were to be cancelled, in consideration of receiving a composition: and it is equally fraudulent to buy off the opposing creditor of an insolvent, as it would place him in a better situation than the rest of the creditors; for under the 25th section of the statute, the future effects of the insolvent are directed to be divided rateably among the creditors, until their debts are wholly paid. An insolvent cannot exist without contracting new debts; and the persons giving him credit after his discharge, are entitled to a preference; and here the party who obtained the warrant of attorney placed herself in the situation of a new creditor, although the debt on which it was founded was contracted long before the defendant's discharge. She was therefore more advantageously situated than the old creditors: and although the intestate might have forgiven his debtor, or given him time for payment, yet he could not require a security for the amount of his debt. If the

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defendant had been imprisoned at his suit alone, the case would have been different. But as the warrant of attorney was founded on a note which had been illegally obtained from the defendant before his discharge, we are empowered to set it aside; for, although a moral obligation may be rendered perfect by a new promise, yet, as the price of the defendant's discharge was contrary to the policy of the statute, and operated in fraud of the general body of creditors, the objection is well founded; and this rule must consequently be made absolute.

Mr. Justice PARK.—I am of the same opinion. The facts are not disputed; and there can be no doubt but that we have a discretionary right to exercise a summary jurisdiction by setting aside the warrant of attorney. The general principle to be collected from all the cases from *Cockshott v. Bennett* (a), is, that one creditor cannot require or obtain a security from his debtor at the expense of the others, as it operates as a fraud on them. Although it has been attempted to distinguish this case from that of a bankrupt, or an insolvent who has entered into a deed of composition, yet the principle, as well as the policy of the law, is, that a private bargain between a debtor and one of several creditors is void, if it tend to defeat the rights of the others. With respect to the statute 1 Geo. 4, c. 119, the only sections that appear to me to apply to this case are the 25th and 26th, the former of which authorises the Insolvent Court to order judgment to be entered up against the prisoner for the amount of the debts from which he shall be discharged, and that, when he shall be of ability to pay them, the Court may permit execution against his property acquired by him after his discharge, which is to be distributed rateably among the creditors; but that must be taken to apply to the creditors named in the schedule; and as the plaintiff's name

was not inserted therein, nor that of her intestate, to whom the note was originally given, she might sue out execution without any application to, or leave of, the Insolvent Court, and thereby obtain an advantage over the rest of the old creditors. The 26th section enacts, that no prisoner, who shall have obtained his discharge by virtue of the act, shall, at any time afterwards, be imprisoned by reason of a judgment entered up under the 25th section; and that, if arrested, he may be released by a Judge of the Court from which the process issued. That must apply to the case of an arrest for a debt due to a former creditor; and if the name of the plaintiff's intestate had been inserted in the schedule, the defendant's person would have been protected, which the former prevented, by taking the note in question; and the plaintiff, after his death, took the warrant of attorney to secure the payment of that note. The case of *Jackson v. Davison* appears to me to have been decided on true grounds; and although we are not bound to act on it, yet, if it be founded on good sense, and according to the principles of law, it would be too much for us to set ourselves up against it.

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Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—Although the warrant of attorney be set aside, the plaintiff will not be precluded from proceeding on the note; and if we were to allow the former instrument to stand, the question as to the validity of the note would be put an end to. It appears to me, that the obtaining of the note was in direct opposition to the policy of the statute. The debtor is entirely at the mercy of his creditor; and he may, in the exercise of angry feeling, or avaricious motives, compel his creditor to come to terms, however unreasonable, and at the expense of the general body of creditors.

Rule absolute.

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Feb. 4th.

On motion to set aside an inquisition, taken on a writ of enquiry before the under-sheriff, for excessive damages, the Court will not admit minutes of what passed before the under-sheriff to be read, unless verified by affidavit: and such motion cannot be supported on the affidavits of the parties themselves, unless corroborated by others.

**LATHBURY v. BROWN and Another.**

THIS was an action of trespass for an assault. The defendants suffered judgment by default, and on a writ of inquiry being executed, before the under-sheriff for Surrey, the Jury found a verdict for the plaintiff, damages 200*l.*

Mr. Serjeant *Vaughan*, having, on a former day, obtained a rule *nisi*, that the inquisition in this cause might be set aside, and a new writ of enquiry executed, on the ground of the damages being excessive, on the affidavits of the defendants alone, unsupported by any others—

Mr. Serjeant *Pell*, now shewed cause, and offered to read minutes of what had taken place before the under-sheriff, with respect to the evidence adduced by the plaintiff, in order to shew that the assault was outrageous, and committed under the most aggravated circumstances.

But the Court refused to admit them, unless they were verified by affidavit; and observed that they would only look at the minutes made by the under-sheriff, as a Judge's report of what takes place at a trial can only be read by a Judge himself. Besides, the rule was improperly obtained in the first instance, as it was founded on the affidavits of the defendants alone, to which little attention should be paid, unless they had been satisfactorily corroborated by those of others; and as the subject of damages was purely a question for the Jury, the party complaining should bring a clear case before the Court, to shew that they were excessive.

**Rule discharged.**

1825.

Friday,  
Feb. 4th.

**SHORT, Assignee of the Sheriff of LINCOLNSHIRE, v.  
HUBBARD and two Others.**

A RULE was obtained by Mr. Serjeant *Vaughan*, on a former day in this Term, calling on the plaintiff to shew cause why the writ of execution which had been sued out on the judgment in this cause, should not be set aside for irregularity, and that the sum of 4*l.* 2*s.* 6*d.*, part of 10*l.* 12*s.* might be restored to the defendant *Hubbard*, and that the Sheriff might, in the mean time, retain the same in his hands. He founded his motion on affidavits, which stated, that on the 7th *April*, 1824, the plaintiff distrained on *Hubbard*, for 4*l.* 17*s.* 6*d.*, for half a year's rent, due to the plaintiff as surviving trustee under the will of one *Ann Fearon*; that certain goods of *Hubbard* were taken under the distress, and stated in the notice of distress to be of the value of 11*l.*; that on the following day, *Hubbard* executed a replevin bond for 100*l.* in the condition of which the goods taken were set out; and a warrant for replevying them was obtained accordingly. That on the 9th *April*, the plaintiff gave *Hubbard* notice that the distress was abandoned, and made another distress for 50*l.* for five years' arrears of a rent-charge, issuing out of the premises on which the first distress was made, and due to the plaintiff as such trustee under the above will, and the goods taken under the first were enumerated in the notice of the second distress, together with others. That *Hubbard* entered his plaint at the first county court, after the execution of the replevin bond, which the plaintiff removed into this Court by a writ of *recordari facias loquela*; that *Hubbard* having omitted to enter an appearance, the plaintiff took an assignment of the replevin bond, and having sued on it and obtained judgment on demurrer (*a*), issued a

The plaintiff having obtained an execution, warranted by a regular judgment, in an action on a replevin bond, the Court refused to set it aside, although it appeared that the bond was given for the prosecution of a prior distress, which had been abandoned; as the objection might have been taken at an earlier stage of the proceedings.

(*a*) See 9 B. Moore, 667.

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SHORT  
" HUSBAND.

writ of *fieri facias*, on which he levied 50*l.* as arrears of rent alleged to be due at the time of making the distress; 4*l.* 15*s.* 8*d.* sheriff's poundage, &c., 35*l.* 12*s.* taxed costs of the action, besides the costs of the distress, writ of *re. fa. lo.*, judgment and execution, amounting in the whole to 102*l.* 12*s.* Under these circumstances, the learned Serjeant submitted, that as the replevin bond was given on the first distress being made for half a-year's rent, and which amounted only to 4*l.* 17*s.* 6*d.*, and not on the subsequent distress for 50*l.*, that the plaintiff could only levy the amount of the half year's rent under the execution; and therefore that the defendant *Hubbard* was entitled to have the above sum of 45*l.* 2*s.* 6*d.* returned to him, as the notice of the abandonment of the first distress could not entitle the plaintiff to proceed on the bond under the second.

Mr. Serjeant *Taddy*, now shewed cause.—It is a well known principle that a party may distrain for one rent, and avow for another; and although the bond might have been irregularly taken, or the sheriff liable to an action, as it exceeded double the value of the goods distrained, yet as the plaintiff has obtained a regular judgment upon it, he was entitled to sue out execution.

Mr. Serjeant *Vaughan*, in support of the rule.—The bond should have been taken in double the value of the goods distrained, *viz.* 22*l.*; and as, after it was given, the plaintiff gave *Hubbard* notice that the first distress was abandoned, the plaint need not have been prosecuted further, and if so, there is nothing to which the bond can apply. The plaintiff has not only obtained judgment on the bond, but sued out execution for 50*l.* for five years' rent, alleged to be due at the time of making the second distress; and as the bond could only apply to the first distress, the

defendant is clearly entitled to have the excess remitted to him.

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**Lord Chief Justice Best.**—I am of opinion that this execution cannot be set aside, as it is warranted by a regular judgment. The defendant should have applied to set aside the proceedings, for an alleged irregularity, at an earlier stage of the cause. The ground of complaint is, that the plaintiff has sued out his execution for too large a sum; but it has not been suggested, that 50*l.* were not due to him, or that five years' rent was not in arrear. The first distress was, in all probability, made by mistake, and, before the bond was executed, *Hubbard* might have had notice of the plaintiff's intention to proceed for the five years' rent, and if so, the bond was properly taken.

The rest of the Court concurring—

Rule discharged with costs.

SMITH, Plaintiff; BRODRICK, Tenant; ——, Vouchee.

Saturday,  
Feb. 5th.

**MR.** Serjeant *Bosanquet*, moved that a recovery that had been suffered in the year 1762, and a fine levied between the same parties in the year 1804, might be amended, by adding the words, "upon *Trent*," after those of "the parish of *Stoke*;" his motion was grounded on affidavits which stated that the estate intended to pass was situated at *Berry Hill*, in the parish of *Stoke upon Trent*, in the county of *Stafford*, and that the possession had followed the recovery to the present time; and that in 1796, a fine was levied, in which a part of the same property was described as being in the parish of *Stoke*, otherwise, *Stoke* parish in the county called "*Stoke*," but merely a hamlet of that name, in which there was no property.

The Court permitted a fine and recovery to be amended by inserting the words "upon *Trent*," after those of "the parish of *Stoke*," on affidavits, stating that the property intended to be conveyed was situate in the parish of *Stoke upon Trent*, and that there was no property in the county called "*Stoke*," but merely a hamlet of that name, in which the parties had no

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 Brodwick,  
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upon *Trent*. That the whole of the estate intended to be conveyed, was situate in the parish of *Stoke upon Trent*, and that there was no parish in the county of *Stafford* known by the name of *Stoke*; but that there was a hamlet of that name in the parish of *Stowe*, where the parties to the fine and recovery had no property whatever, nor was there any farm called *Berry Hill* within that hamlet.

The Court considering these affidavits to be sufficient, ordered the amendment to be allowed.

*Saturday,*  
*Feb. 5th.*

THOMPSON and Another, Assignees, &c. v. JENNINGS.

A verdict was taken for the plaintiff at *Nisi Prise*, by consent, with leave for the defendant to move to set it aside; a rule having been obtained accordingly, the Court ordered the verdict to stand, and the amount of damages to be referred to an arbitrator, who made his award in vacation:— Held, that an application to set aside the award must be made within the first four days of the next ensuing Term.

THIS was an action of trover, brought by the plaintiffs, as assignees of one *Chapman*, a bankrupt, to recover the value of a quantity of timber, which the plaintiffs alleged had been purchased by the defendant from the bankrupt, after he had committed an act of bankruptcy.

At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after *Trinity Term*, 1824, it appearing that the bankrupt had paid over a certain sum to his attorney, for the purpose of satisfying the demands of some of his creditors, which the attorney had converted to his own use; and that the plaintiffs had sued him, and recovered the greater part of it, unknown to the bankrupt; a verdict was taken by consent, for the plaintiffs, for £375*l.* being the value of the timber, with leave for the defendant to move to set it aside, in case the Court should be of opinion that any and what part of the sum recovered by the assignees from the bankrupt's attorney should be deducted.

A rule was accordingly obtained, in the last *Easter Term*, and, on cause being shewn, the Court ordered the verdict to stand, and that it should be referred to an arbitrator

to ascertain the amount of damages the plaintiffs were entitled to recover. On the 29th *August* last, the arbitrator made his award, by which he ordered 500*l.* to be deducted from the verdict, stating the special circumstances, which had induced him to make such deduction, on the face of the award.

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" JENNINGS.

Mr. Serjeant *Taddy*, on the *last day but one* of the last Term, *six*. the 27th *November*, (the rule of reference having been previously made a rule of Court,) obtained a rule *nisi* that this award might be set aside, on the ground of a miscalculation made by the arbitrator, as well as on account of a mistake as to the law of the case, which was apparent on the face of the award.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Lawes*, now shewed cause, and contended, that the application to set aside the award was too late, as it should have been made within the *first four* days of the last Term, the award having been made in the preceding vacation; and they cited the case of *Borrowdale v. Hitchener* (*a*), where it was determined, that if a verdict for a plaintiff be taken at *Nisi Prius*, subject to the award of an arbitrator, and the award be made in vacation, the defendant can only impeach it within the *first four* days of the next Term.

Mr. Secondary *Hewlett* referred to a case of *Wilkinson v. Stewart* (*b*), where this Court decided, that in all cases where a verdict had been found subject to a reference, and an award was made in vacation, whether before or after the return of the *habeas corpora juratorum*, final judgment should not be entered up till after the *first four* days of the Term next ensuing the date of the award, in order that the party dissatisfied therewith might have an opportunity of taking the judgment of the Court upon it.

(*a*) 3 Bos. & Pul. 244.

(*b*) C. P. 59 Geo. 3.

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Lord Chief Justice Best.—If this award be set aside, there must be a new trial, as we cannot compel the arbitrator to make another award; and as the verdict was subject to the award, if one fall, the other must follow. The arbitrator very properly, in making his award, stated on the face of it, the facts which had influenced him to come to the conclusion he did; and although it was held in the case of *Synge v. Jervoise* (*a*), that the time limited by the statute 9 and 10 Will. 3, c. 15, s. 2, for setting aside awards made under submissions by virtue of that act, does not extend to awards where the reference has been by order of *Nisi Prius*, yet, as there has been a verdict in this case, it falls within the principle of *Borrowdale v. Hitchener*; and, therefore, the motion for setting aside the award is made too late.

Mr. Justice GASELEE referred to a case in the *Exchequer*, where in an action of trespass for taking trees, the question was, whether the plaintiff were entitled to them, and after verdict for him, a new trial was moved for, which the Court refused, but left it to an arbitrator, to determine to whom the trees belonged; and he having made his award in the vacation, and no motion being made to set it aside within the first four days of the following Term, the Court refused to interfere; and the learned Judge said, that although the statute of *William* does not attach on awards made under orders of *Nisi Prius*, yet this case does not fall within that rule, as the plaintiffs had, at the trial, obtained a verdict which the Court afterwards directed to stand, and that the amount of the damages to which they might be entitled should be decided by an arbitrator, who reduced them accordingly, and stated his reasons for so doing on the face of his award. This rule therefore must be

Discharged.

(a) 8 East, 466.

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DENN, on the joint and several demises of RICHARD Nowell and Another, v. JOHN HENRY ROAKE, and three Others.

Monday,  
Feb. 7th.

THIS was an action of ejectment for the recovery of a messuage, corn-mills, dwelling houses, and other premises, situate at Godalming in the county of Surrey. The declaration contained several counts, in some of which the lessors of the plaintiff claimed the entirety, and in others an undivided moiety of the premises. The defendants pleaded Not Guilty.

A testatrix, being seized of one undivided moiety of an estate in Surrey, and having a power of disposing of the other moiety, of which power she was the creatrix, and having no other real estate there, devised all her freehold estate in Surrey, to her nephew, J. R., for life, on condition that out of the rents thereof, he should, from time to time, keep such estate in proper and tenantable repair; and, on his decease, to and amongst his children equally, at 21, and their heirs, as tenants in common; and in default of such children, remainders over to the other nephews and nieces of the testatrix:— Held, that the devise was a sufficient execution of the power, and that both moieties passed under it to the nephew; although it was objected that there was no reference to the power in the will, nor even an intent manifested by the testatrix to pass the lands which were the subject of the power.

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freehold, until a good and perfect recovery should be had and obtained against him by *Johnson*, as demandant, in which *Scott* and his wife, and *Roake* and his wife should be vouched to warranty; and it was thereby declared, that the said recovery and all other assurances, then, or to be had of the same tenements, should be taken to be and enure to the several uses therein particularly mentioned and declared, that is to say, "as to one full and equal undivided moiety, or half part of the said tenements, to the use of *T. Scott* and his assigns, for life, without impeachment of waste; and after his decease to the use of *Sarah* his wife, for her life, without impeachment of waste; and after the several deceases of both, to the use of such person and persons, and for such estate and estates as the said *Sarah Scott*, whether covert or sole, should, by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing, purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, direct, limit, or appoint; and for want of such appointment, to the use of all and every the child and children of the said *Thomas Scott*, on the body of his wife to be begotten, to be divided equally between them, as tenants in common, and not as joint tenants; and of the several and respective heirs of such child and children; and for default of such issue, to the use of the said *Elizabeth Roake*, for life, without impeachment of waste; and after her death, to the use of her children, as tenants in common, and their heirs; and for default of such issue, to the use of the said *Thomas Scott*, in fee. And as to the other full and equal undivided moiety or half part of the said tenements, to the use of the said *Henry Roake*, for life, without impeachment of waste; and after his decease, to the use of *Elizabeth*, his wife, for life; remainder to the use of such per-

sons as she, whether covert or sole, should by deed or will appoint, in the same terms as in the preceding limitation to *Sarah Scott*; and for want of such appointment, to the use of all the children of the said *Henry Roake*, on the body of his wife to be begotten, to be divided equally between them, as tenants in common, and not as joint tenants, and of the several and respective heirs of such child or children; and, for default of such issue, to the use of the said *Elizabeth Roake* for life, without impeachment of waste; and, after her decease, to the use of her children, as tenants in common, and their heirs; and for default of such issue, to the use of the said *Henry Roake* in fee."

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It was then found, that on the 11th *April*, 23 Geo. 2, *Johnson* sued out and prosecuted a writ of entry *sur disseisin en le post*; and that such proceedings were therewith had, that seisin of the tenements was, on the 15th *May* following, delivered to him; and that such tenements were the same as those mentioned in the indenture of the 26th *April*, 1750; and that, by virtue of such indenture and recovery of the 23 Geo. 2, *Scott* and his wife, and *Roake* and his wife, entered into the tenements, and became seised of such estates and interests therein as could lawfully pass to them by virtue thereof. That *Thomas Scott* died in 1758, without issue, leaving his wife *Sarah* surviving; and that in 1763, she intermarried with one *John Trymmer*, who died in *June*, 1766, leaving the said *Sarah Trymmer* him surviving. That *Elizabeth Roake* died in *May*, 1775, leaving her husband *Henry Roake* and one son, *John Roake*, her surviving, but without having made any appointment in respect of the tenements in question, under or by virtue of the indenture of the 26th *April*, 1750. That by indentures of lease and release, of the 6th and 7th *September*, 1775, between the said *Henry Roake*, of the first part, *John Roake* his son, of the second, the said *Sarah Trymmer*, widow, of the third, one *Benjamin Parnell*, of the fourth, and one *James Morgan*

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of the fifth part; after reciting, that the said *Henry Roake* was seised, as tenant for life, of one undivided moiety of the said tenements; and that his son, *John Roake*, was entitled as tenant in tail, immediately expectant upon the decease of him the said *Henry Roake*, of the same moiety; and that the said *Sarah Trymmer* had agreed with the said *John Roake* for the purchase of his interest in the said moiety, subject, nevertheless, to the life estate of the said *Henry Roake* therein, at the price of 500*l.*; and that the said *John Roake*, the son, had requested the said *Henry Roake* to join with him in conveying and limiting the same moiety; to which request he had consented: it was by the said indenture witnessed, that in pursuance of the said agreement and request, and for docking and barring all estates tail, &c., and in consideration of such sum of 500*l.* paid to the said *John Roake*, by the said *Sarah Trymmer*, for the purchase money, of and from which the said *John Roake* did acquit, release, and for ever discharge the said *Sarah Trymmer*, her heirs, &c., they, the said *Henry Roake* and *John Roake*, at the request, and by the direction of the said *Sarah Trymmer*, granted, bargained, sold, released and confirmed, to the said *Benjamin Parnell*, all that the said undivided moiety of the said tenements, to have and to hold the same to him, the said *Benjamin Parnell*, his heirs and assigns, to the intent that he might, by virtue of that indenture, become a good and perfect tenant of the freehold of all the tenements thereby released, against whom one or more recovery or recoveries might be had; and, for that purpose, it was concluded and agreed between the said parties to the indenture, that it should be lawful for the said *James Morgan*, at the costs of the said *Henry Roake*, forthwith to sue out and prosecute against the said *Benjamin Parnell*, one or more writs of entry *sur disseisin en le post*, thereby demanding against him the thereby released tenements, by such names as would effectually comprise, and extend to pass, the whole

of the said tenements; to which writ or writs the said *Benjamin Parnell* should appear, and vouch to warranty the said *John Roake*, who should thereupon appear and enter into warranty, and vouch over the common vouchee, who should appear, &c.; so that one or more recoveries with a double voucher should be suffered of the thereby released tenements. And it was thereby declared between the parties to that indenture, that the said recovery or recoveries, as well as all other conveyances and assurances of the thereby released tenements, should be and enure to the use of the said *Henry Roake*, for his life, and immediately after his decease, to the use of the said *Sarah Trymmer*, her heirs and assigns for ever. It was then found, that *Henry Roake* died on the 15th December, 1777; and that the said *Sarah Trymmer*, on the 6th June, 1783, made her will, duly executed, and thereby gave and devised all her freehold estates, as follows:—

“ I hereby give and devise all my freehold estates, in the city of *London* and county of *Surrey*, or elsewhere, to my nephew, *John Roake*, for his life, on condition, that, out of the rents thereof, he do, from time to time, keep such estates in proper and tenantable repair. And on the decease of my said nephew, *John Roake*, I devise all my said estates, subject to, and chargeable with, the payment of 30*l.* a-year, to *Ann*, the wife of the said *John Roake*, for her life, by even quarterly payments, to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, or his or her heirs, at his or her age of twenty-one. And in case my said nephew, *John Roake*, should die without lawful issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of 30*l.* a-year, to the said *Ann Roake*, for her life, in manner aforesaid, to and among my nephews and nieces, *Miles Thomas*, *John James*, *Sarah*,

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*Penfold*, and *Susannah Longman*, or such of them as shall be then living, and their heirs and assigns, for ever."

It was then found, that *Sarah Trymmer*, the testatrix, died on the 4th December, 1786, without revoking her will, leaving the said *John Roake*, her heir-at-law, her surviving; and that she had not, at the time of making her will, or at her death, any other freehold lands or tenements than those mentioned in the declaration. That by a certain indenture quadripartite, of the 26th April, 1787, between the said *John Roake*, nephew and heir of the said *Sarah Trymmer*, of the first part; *S. Penfold* and other the nephews and nieces, devisees in reversion, named in the will of the said *Sarah Trymmer*, of the second part; the said *Benjamin Parnell* of the third part; and *Thomas Holland* of the fourth part; after reciting the death of *Henry Roake*, in 1777, and of *James Morgan*, on the 23rd February, 1782; the will of *Sarah Trymmer*, and her death, in 1786, as above stated; and that *Ann Roake* died on the 10th August, 1786; and that *John Roake*, at the time of making the last-mentioned indenture, was unmarried, and had no issue; and that the recovery intended to have been suffered, pursuant to the indenture of the 27th April, 1775, had never been suffered; and that the parties were desirous that such recovery should be suffered; it was, by the indenture of the 26th April, 1787, witnessed, that a recovery should be suffered, with a double voucher; and that the said *Thomas Holland*, as recoveror, should, immediately after suffering the same, be seised of the thereby released tenements, to enure to such uses as the same were devised by the will of the said *Sarah Trymmer*. That the recovery was suffered, and seisin of one moiety of the premises delivered to *Holland* accordingly. That in Michaelmas Term, 30 Geo. 3, the said *John Roake* levied a fine *sur conuance de droit come ceo, &c.* of the premises in the declaration mentioned, to the use of himself in fee, in pursuance of a covenant contained in an indenture, made between him and *Richard*

*Nowell*, on the 5th November, 1789. That in *Trinity Term*, 1797, the said *John Roake* also suffered a recovery of the premises, to the use of such persons as he should appoint, and for default of appointment, to himself in fee. That in pursuance of indentures of lease and release of the 3rd and 4th July, 1797, between the said *John Roake* and *Elizabeth*, his wife, of the first part, *Richard Nowell* of the second, and *John Radcliffe*, of the third part, the premises were conveyed to *Nowell* in fee, to make him tenant to the *precipe* of a recovery to be suffered, for the purpose of barring estates tail, to the use of the said *John Roake*; and that by indentures of lease and release of the 20th and 21st May, 1802, between *John Roake* of the first part, *Richard Nowell* of the second, *John Atkinson* of the third, *W. Smith* of the fourth, and *W. Atkinson* of the fifth part, the said *John Roake*, in consideration of 1,220*L.* purchase money, appointed all the tenements in the declaration mentioned, to *John Atkinson*, to such uses as *Richard Nowell* should appoint, and, in default of appointment, to *Richard Nowell* for life, remainder to *Atkinson* as a trustee to bar dower, remainder to *Nowell* in fee. That *John Roake* died on the 13th of February, 1803, leaving the defendants, *John Henry Roake*, *Thomas William Roake*, *Elizabeth Roake*, and *George Roake*, who were his only children, him surviving, being then all infants, under the age of twenty-one years; and that the said *Richard Nowell*, being so seised of the said tenements, on the 2d July, 1811, demised them to the said *John Denn*, for twenty-one years from thence next coming, by virtue of which he entered, &c., and continued in possession until he was expelled by the defendants; but whether the defendants were guilty of the above ejectment or not, the Jury prayed the advice of the Court, &c.

The case was twice argued, first, in the last *Trinity Term* by Mr. Serjeant *Bosanquet*, for the lessors of the plaintiff, and by Mr. Serjeant *Onslow* for the defendants; and again in the last Term by Mr. Serjeant *D'Oyley* for the

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lessors of the plaintiff, and by Mr. Serjeant *Peake* for the defendants.

For the lessors of the plaintiff it was submitted, that two questions were raised by the special verdict, *viz.* *First*, What interest the children of *John Roake*, the devisee, took under Mrs. *Trymmer's* will, and whether they were barred by the fine of *Michaelmas Term, 30 Geo. 3.* *Secondly*, whether, as to one undivided moiety of the premises, such will were a valid execution of the power of appointment, reserved to her by the deed of the 26th *April*, 1750.

[Lord Chief Justice *Best* here observed, that, as to the first question, the case of *Doe d. Roake v. Nowell* (*a*), was decisive; where it was held, by the Court of *King's Bench*, that the children of *John Roake*, the nephew and devisee, took a vested remainder; and that the judgment of that Court was afterwards affirmed in the House of Lords, in *May*, 1817 (*b*).]

The will of Mrs. *Trymmer* was not a valid execution of the power of appointment reserved to her by the deed of *April*, 1750. She was seised of one undivided moiety of the estate devised, by purchase, and had a power of disposing of the other; but no reference was made to the power in the will; and although it need not have been recited, yet there should have been some reference to the estate on which it was intended to operate. In Sir *Edward Clere's* case (*c*), it was resolved, "if a man seised of lands in fee, make a feoffment to the use of such person and persons, and of such estate and estates, as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee; that is to say, till declaration and limitation be made according to his power; and if, in such case, the feoffor by his will limit estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment,

(*a*) 1 *Mau. & Selw.* 327.      (*b*) 5 *Dow's Rep.* 202.      (*c*) 6 *Rep.* 18 a.

and the use is directed by the will; so that, in such case, the will is but declaratory: but if, in such case, the feoffor, by his will in writing, devise the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will; for the testator had an estate deviseable in him, and power also to limit an use; and he had election to pursue which of them he would; and when he devised the land itself, without any reference to his authority or power, he declared his intent to devise an estate, as owner of the land, by his will, and not to limit an use according to his authority; and, in such case, the land being held *in capite*, the devise is good for two parts, and void for the third part; for, as the owner of the land, he cannot dispose of more; and, in such case, the devise cannot take effect by the will for two parts; and by the feoffment for the third part; for he made his devise as owner, and not according to his authority; and his devise shall be of as much validity as the will of every other owner having any land *in capite*. So, if a man make a feoffment in fee, of lands held *in capite*, to the use of his last will, although he devise the land with reference to the feoffment, yet the will is void for a third part; for a feoffment to the use of his will, and to the use of him and his heirs, is all one." That doctrine has never been impeached; and Mr. Justice *Heath*, in the case of *Buckland v. Barton* (*a*), said, that the true rule, as to powers of appointment by will, was well laid down in Sir *Edward Clere's* case, *viz.* that where one has a power to appoint by will, but makes a will without any reference to the power, the appointment shall have no effect, unless the will would otherwise have no operation; and this principle was alluded to in *Andrews v. Emmot*; where Lord *Thurlow* said (*b*) "the testator, under the settlement, was competent to make a will as to so much of his property as should remain after the death of his wife;

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the question is, whether, in making that will, he has executed the power against his wife, whose property the fund was? It is necessary, in order to do this, that he should, by his will, notify his intention to do it. It is too late now to expect that a testator, in order to execute a power, shall make an express reference to it; because it has been determined, that if a man dispose of that over which he has a power, in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. But the doctrine is not carried, by any case, further than this; and it would be cruel to do it, as it would be throwing the property of testators into utter confusion." In *Sugden on Powers* (a), it is said, "it is firmly settled, that a mere general devise, however unlimited in terms, will not comprehend the subject of a power, unless it refer to the subject, or to the power itself, or, generally, to any power vested in the testator, or unless some part of the will would otherwise be inoperative;" and several authorities are referred to in support of that position. In *Jones v. Curry* (b), where a will of a person, having a power to dispose of a fund, consisting partly of real estates, and partly of household furniture, linen, and plate, contained a gift of "all the devisor's estates and effects, of whatsoever denomination, and of his household furniture, with linen and plate;" it was held not to bear execution of the power; and the Master of the Rolls there said, that(c) "whatever was the inadequacy of a testator's property to satisfy the terms of a will, and whatever might be the conviction of the Court of his intention to execute the power, the state of his personality, at the time of the will, or of the death, cannot be examined, for the purpose of collecting evidence of his intention; but that, with regard to real estate, the Court may examine whether the circumstances

of the testator's property be such as to give effect to the will, and that if the will in question had contained an unequivocal devise of realty, the Court, under the authority of *Standen v. Standen* (*a*), must, in order to give operation to an instrument which would otherwise be inoperative, have resorted to the fund, the subject of the power. That the distinction, notwithstanding some expressions of Lord Rosslyn in *Standen v. Standen*, being now established between property and power, the words in the will "all my estates and effects of whatever denomination," containing no direct reference to any particular fund, nothing in description to enable the Court to collect an intention to exercise the power, are not sufficient to designate, with due certainty, property not her own, but of which the testatrix was empowered to dispose. In *Brady v. Westcott* (*b*), Sir William Grant admitted the authority of *Standen v. Standen*, but dissented from the argument on which the Lord Chancellor proceeded. In *Doe dem. Hellings v. Bird* (*c*), where a person having power to appoint lands, by will, amongst children, and having other lands, by his will (not referring to the power), gave legacies to his several children, and then devised "all the rest, residue, and remainder of his lands, &c. and personal estate, after payment of his debts, legacies, and funeral expenses, to his eldest son; it was held that the power was not thereby executed, as there was nothing in the will, referring, in any manner, to the power, nor whence an intention to execute it could be inferred; and in *Andrews v. Emmot* (*d*), the testator, having a power over 3000*l.*, originally the property of his wife, gave several legacies, and then, (after the death of his wife), the residue to the defendant, and his estate was not sufficient to pay the legacies, it was yet held, that the will was not an execution of the power, *the same not being referred*

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(*a*) 2 Ves. 589.

(*b*) 13 Ves. 453.

(*c*) 11 East, 49.

(*d*) 2 Brown's Chan. Cas. 297.

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*to*, nor any thing shewing an intention in the testator to execute it. In *Powell v. Loxdale* (*a*), where *M. P.* devised all her lands, &c., in *Westley*, in the county of *S.*, to *A.* and his issue; and in default of issue, to such uses as *A.* might, by his will, appoint; and *A.*, by a will made in the lifetime of *M. P.*, devised all his lands in the parish of *Worthen*, and elsewhere, in the county of *S.*, after several estates for life and in tail, to *his own right heirs in fee*; and afterwards, by a codicil, made after the death of *M. P.*, revoked the devise of the reversion to his heir, (in all other respects expressly confirming the will), and then devised the reversion in fee of all his *said* lands, in the parishes of *Worthen*, *Westbury*, and *Cherbury*, in the county of *S.*, to *B.*; and *A.* had no other land in *Westbury*, except the lands in *Westley*, (which is in the parish of *Westbury*), devised to him by the will of *M. P.*; it was held, that the power of appointment was not well executed by the codicil. In *Jones v. Tucker* (*b*), where *M. M.* gave to the defendant all her freehold and copyhold estates, upon trust to permit *E. S.* to receive the rents, &c. during her life; and after her death, to sell, and, out of the produce, to pay 100*l.* to such person as she should by will appoint; and *E. S.*, by will, without reference to the power, gave 100*l.* and the whole of her household furniture, to the plaintiff;—and it was charged by the bill, and not denied, that the testatrix had no personal property at the time of her death, save some household furniture of small value; an enquiry was prayed as to the state of the property *at the time of making the will*, with the view of ascertaining that the testatrix must have intended the gift of the 100*l.* as in the execution of her power—but the enquiry was refused. In *Sloane v. Cadogan* (*c*), it was admitted, in argument, that, in general, a sweeping disposition, however unlimited in terms, would not include property over

(*a*) 2 Barn. & Ald. 291.

(*b*) 2 Meriv. 533.

(*c*) Sugden on Powers, 3rd Edit. 291.

which the testator had merely a power, unless an intention to execute the power could be inferred from the will. The principles deducible from all these authorities are, that although a person may execute a power without reciting or noticing it, yet it is necessary that he should mention the estate or interest which he disposes of; that he must do such an act as shews that he had in view the thing of which he had the power to dispose; and that, at all events, an express interest must appear to pass lands, which are the subject of the power; and, applying those principles to the present case, as the testatrix had other lands, on which the devise could operate, it could not be referred to that moiety of the estate which was subject to the power, in order to render it available. There was not only no reference to the power in terms, but no description of the estate intended to be disposed of. The testatrix had other lands to which the devise could apply, and it could not be extended to the moiety over which she had a mere power of appointment, in order to render the devise available. The estates in *Surrey* must be considered as two distinct farms, and of a different tenure, as though situate in two counties, or at a distance from each other.

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Denn  
d.  
Nowell  
w.  
Roach.

For the defendants, it was contended, that Mrs. *Trymer's* will was a good execution of the power of appointment, which she had reserved to herself by the deed of 1750, without putting a strained construction on either of the words contained therein, or violating any rule of law. It is clear, that she intended to dispose of all her freehold estates, which would necessarily include both moieties of the property in question, *viz.* as well that which came to her by descent, as that which she afterwards acquired by purchase, and over which she had a power of appointment. Although an instrument by which a power is executed must have some reference to the estate on which it is intended to operate, yet it is sufficient if the estate subjected to the power be referred to, in terms which include it with other

1825.  
 Deane  
 v.  
 Nowell  
 &  
 Roake.

property of the appointor, although it be not particularized. And in *Standen v. Standen* (*a*), where the testator, by his will, after directing his real estate to be sold, gave the money arising from the sale, and the residue of his personal estate, in trust for his wife, for life, and after her decease, as to one moiety, for such person or persons as she should, by any deed or writing, or by will, with two or more witnesses, appoint; and the real estate was not sold, and the testator's widow received the rents and profits, and the produce of the personal estate, for her life; and by her will, after disposing of some specific articles, which she described to have been her husband's, gave the residue thus:—"all the rest, residue, and remainder of my estate and effects, of what nature or kind soever, and whether real or personal, and all my plate, china, linen, and other utensils, which I shall be possessed of, interested in, or entitled to, at the time of my decease, subject to, and after payment of, all my just debts, funeral expences, and charges of proving my will, and specific legacies, I give to S. H. for his own use and benefit; and I do appoint him my executor," it was held that the power was executed by the residuary clause. That case goes the full length of this, and there was no reference to the subject matter of the power, or to the locality or nature of the estate. And Lord *Loughborough* there said (*b*), "take it according to the strict technical rule in Sir *Edward Clere's* case, that a general disposition will not dispose of what the party has only a power to dispose of, unless it be necessary to satisfy the words of the disposition. The testatrix had no other real estate. I am bound to satisfy all these words upon the technical rule.. I can satisfy them no other way. I cannot avoid supposing, what every one must be convinced she meant, that she made no difference between what she had from her husband, and her other property;" and this decree was affirmed on an appeal to the House

of Lords (*a*). Here, the intention of the testatrix admits of no doubt, as she devised all her estates in *London* and *Surrey*, or elsewhere, and she had no estates but in those two places. The case of *Andrews v. Emmet*, turned on the mere question of personal property, *viz.* money in the funds; and in *Jones v. Curry*, the Master of the Rolls drew the true distinction between real and personal property, saying, that whatever was the inadequacy of a testator's property to satisfy the terms of the will, and whatever might be the conviction of the Court of his intention to execute the power, the state of his personality at the time of the will, or of the death, cannot be examined for the purpose of collecting evidence of his intention; but that, with regard to real estate, the Court may examine whether the circumstances of the testator's property be such as to give effect to the will. In *Dillon v. Dillon* (*b*), where, by the terms of a marriage settlement, *A.* had power to appoint an estate among his children, and his will referring to the estate but not to the power, was declared to be a good execution of it; and Lord *Manners* there said (*c*), that "as the will had a direct reference to the subject of the power, he apprehended it was sufficient to make it good as an appointment, though it might be bad as a devise." In *Ex parte Caswall* (*d*), it was held, that a person might execute a power, if he do such an act as shews that he takes notice of the thing which he had a power to dispose of; and there, there was no reference whatever to the power. In *Morgan* dem. *Surman v. Surman* (*e*), where a person, having only an estate for life, with a power to appoint in fee, devised the property as her own, it was held to be a good execution of the power; and Sir *James Mansfield* said (*f*), "the testatrix taking, as she did, only a life

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d.  
NOWELL  
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(*a*) *Nomine Standen v. Macnab*,  
6 Brown's Parl. Cas. 193.

(*b*) 1 Ball & Beatty, 77.  
(*c*) Id. 92.

(*d*) 1 Atk. 559.  
(*e*) 1 Taunt. 289.

(*f*) Id. 299.

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d.  
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a.  
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interest in the real estate, had certainly only a power over the reversion, and not an interest in it; and, therefore, although she used terms of devise, it was plain that she meant to execute the power." So here, although the testatrix acquired a moiety of the estate by purchase, still she intended to give the whole of it to her nephew; she had no other estate distinct from it, and the words of the will cannot be satisfied by confining them to the after-acquired property. The word *estates*, in the will, must be taken in its popular sense, as descriptive of the property devised, and not of the interest the testatrix had in such estates, and more particularly so as she had no other free-holds, than those mentioned in the declaration. In *Maddison v. Andrew* (a), where the grantor, in a voluntary settlement, limited a term to trustees, with power to charge 1000*l.*; and by his will, without any reference to the power, charged all his real and personal estates with the payment of his debts and legacies; Lord *Hardwicke* held, that the power was executed, as it was to be construed liberally; and that, as to the execution of it, the donor had used the word *charge*, which was the word in the power; and that it was only a shadow of a difference, that he had charged all his estate; whereas, that was before settled to uses, for that these powers to the owner were to be considered as part of the property." So here, the testatrix has charged her estates, after the death of her nephew, and annexed a condition that he should keep them in repair during his life-time, and which he could not perform unless he were in possession of the whole; and when it is considered that both moieties were originally united, and formed but one estate, and were held under the same title, there can be no doubt of the intention of the testatrix to pass the entirety of the estate; and this intent is sufficiently manifested on the face of her will: and in *Probert v. Mor-*

gen (*a*), it was held, that if a person, in the execution of a power, sufficiently describe the estate he had a power to charge, the estate is bound, although there be no reference to the deed out of which the power arises.

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d.  
NOWELL  
v.  
BOAKE.

In reply, it was insisted, that although general words in the residuary clause of a will, may operate as a good execution of an appointment, if the will cannot take effect without it, yet that, in this case, there was no evidence of an intent to pass the moiety of the estate, which was the subject of the power, nor could any inference of such an intent be drawn, there being no reference to the power, nor description of the estates devised. In *Dillon v. Dillon*, the testator enumerated the leases, and described the locality of the lands devised. *Ex parte Caswall*, came before Lord *Hardwicke* on a petition, and his Lordship stated, that he would not say what his opinion would be, if it came on upon bill and answer: and in *Sugden on Powers* (*b*), it is said, that his Lordship over-ruled this case by a later determination. In *Morgan d. Surman v. Surman*, Sir *James Mansfield* drew a distinction, and said (*c*), "it is true, that where a person, having an interest and a power, does not refer to the power, it shall be held that he means only to dispose of his interest, according to *Clerc's* case:—but, where *A.* is seised of an estate, with a power for *B.* to appoint, there, *B.* having no estate, his act shall necessarily be inferred to be done in execution of the power." Here, however, the testatrix was the créatrix of the power, as to the lands in question, and did not make her will until after the purchase of the other moiety. It does not therefore follow, that both moieties must pass of necessity; as she devised all her estates, and had land to satisfy the terms of the devise, without extending it to that over which she had a mere power of appointment. Although

(*a*) 1 Atk. 441.

(*b*) 3rd Edit. 293.

(*c*) 1 Taunt. 298.

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it has been said, that it was the manifest intention of the testatrix to devise the whole of her estates to her nephew, for life, by annexing the condition that he should keep such estates in repair, still that part of the argument is founded in fallacy, and the condition does not, by necessary implication, refer to lands, but to the property devised; and the only question is, of what that consisted. The testatrix and her sister were at first tenants in common, and took distinct and separate estates, each having a power of appointment over their respective moieties, and although the one afterwards became possessed of the whole, still she might devise one moiety to *A.* for life, on the condition that he would keep both in repair; and although it has been further insisted, that the devisee could not perform the condition, unless he were in possession of the whole of the estate; yet, in *Fitzherbert's Natura Brevisum* (a), it is said, that where there are three tenants in common, or joint, or *pro indiviso* of a mill, or a house, &c. which falls to decay, and one will repair, but the other will not, he shall have a writ *de reparacione facienda*:—and although it may be doubtful whether that can extend beyond the repairs of a house or other building, yet, the party may have his remedy by a writ of partition.

*Cur. adv. vult.*

Lord Chief Justice Best, on this day, (after stating the most material parts of the special verdict, and particularly adverting to the terms of the indenture of the 26th April, 1750, by which one undivided moiety of the tenements in question was settled to the use of *Sarah Scott*, afterwards *Sarah Trymmer*, subject to the power of appointment therein expressed, and the other moiety to her sister, *Elizabeth Roake*, on the like terms; and reading the will of *Sarah Trymmer*, made after the death of her husband, *John Trymmer*, and the purchase by her of *Henry Roake's*

(a) 8th Edit. Quarto, 295.

interest in the other undivided moiety, after the death of his wife; and stating that *John Roake*, the devisee, afterwards conveyed all the tenements in the declaration to *Nowell* in tail); observed, that the Court had required time for deliberation, in order to arrive at a satisfactory conclusion; and that, as the titles to many estates depend on the validity and due execution of powers, they were most anxious not to disturb any rules that had been laid down respecting them, but wished most strictly to adhere to them, and proceeded to deliver the judgment of the Court, as follows:

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Nowell  
a.  
Roake.

Two questions were originally presented to our consideration on this special verdict; *first*, what estate the children of *John Roake* took, and whether they were barred by the fine levied in *Michaelmas Term*, 30 Geo. 3. That question having been decided in *Doe d. Roake v. Nowell* (*a*), where the Court of *King's Bench* held, that they took vested remainders: and that judgment being afterwards affirmed in the House of Lords (*b*), is so far conclusive as to that point, that we did not feel ourselves at liberty to reconsider it; and therefore would not allow it to be argued at the bar. The only remaining question now to be considered is, whether, as to a moiety of the premises in question, Mrs. *Trymmer's* will be a good and valid execution of the power of appointment which she reserved to herself in the deed of 1750? To decide this, it will be necessary to ascertain, *first*, whether there be any evidence of an intention by her to execute that power as required by law; and *secondly*, whether her will contain the necessary proof of such an intent, or it can be inferred from evidence to be collected *aliunde*. In order to arrive at a conclusion on the first point, it will be necessary to examine the several authorities and principal decisions on the subject. Lord *Coke* says (*c*), that clauses containing

(*a*) 1 *Mau. & Selw.* 327.    (*b*) 5 *Dow,* 202, 224.    (*c*) *Co. Lit.* 237 a.

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powers of revocation are favourably interpreted, because many men's inheritances depend on them, and that *ex paucis dictis intendere plurima possit*; and his Lordship was there commenting on *Littleton*, who says (*a*), "many other things there are of estates upon condition in law, and in such cases it is not needed to shew any deed rehearsing the condition, for that the law itself purporteth the condition." Lord *Coke* probably thought a favourable construction to be necessary, from the state of property at the time he wrote, without considering whether the powers themselves should be strictly and duly executed; but although an express declaration of an intent to execute a power be not necessary, yet the Courts have since required full and satisfactory proof of an intent, by a testator, to execute such an instrument, at the time of making his will. Nothing has tended more to unsettle and shake the landmarks of real property than favourable interpretations in cases of the execution of powers; and it is impossible to say to what extent they may be carried, if well known and established rules be not strictly adhered to. Such a doctrine would, in point of fact, tend to supersede the law; for clauses or provisoies containing powers of revocation were unknown at common law previously to the statute of uses (*b*), when, as Lord *Coke* expresses it (*c*), "they crept into voluntary conveyances;" and powers were a species of transmutation of property wholly unknown prior to that statute. In the case of *The Earl of Darlington v. Pultney* (*d*), Lord *Mansfield* said, "powers being a new thing, and the Courts of law having no equitable precedents in point to guide them, compared them at first to conditions, which they are not at all like, and, consequently, held, that they should be construed strictly. They looked upon them in the light of powers, vested in a third person, over the estate of another man,

(*a*) Sect. 384.

(*b*) 27 Hen. 8, c. 10.

(*c*) Co. Litt. 237 a.

(*d*) Cowp. 266.

whereas, in fact, they are only a different species of ownership and enjoyment of property. But a long series of precedents has now settled, in the Court of *Chancery*, that, in the construction of powers, wherever the power is executed for a meritorious consideration, *viz.* as a provision for a wife or child, or for the benefit of creditors or purchasers, there the precise form prescribed for its execution need not be strictly pursued." His Lordship therefore applied a favourable construction to those cases only where powers were executed for *meritorious* considerations, as in cases of relationship, where a wife or child has a strong and natural claim. But in all other cases it has been determined that powers must be so strictly executed, that the statute, 54 Geo. 3, c. 168, was passed, by which it was provided, that the attestation of a witness or witnesses to a deed made with the intent to exercise a power, expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing, or any other form of attestation, should not exclude the proof or the presumption of signature. In Sir *Edward Clere's* case (a), *Clement Harwood* being seised of three acres of land, each of equal value, held *in capite*, made a feoffment in fee of two of them, to the use of his wife, for her life, by way of jointure, and afterwards made a feoffment, by deed, of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last will in writing; and he afterwards, by such last will, devised the said third acre to one in fee; and the question was, whether this devise were good for *all* the third acre, or only for two parts of it, or whether it were void for the whole; and it was resolved, (among other things), that when *Harwood* had conveyed two parts to the use of his wife, by act executed, he could not, as owner of the land, devise any part of the residue by his will; so that he had no power to devise any part of the

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third acre, as owner of the land; and, because he had not elected either to limit it according to his power, or to devise it as owner of the land, (for having, as owner of the land, conveyed two parts to the use of his wife), he could not make any devise thereof, and, therefore, that the devise ought, of necessity, to enure as a limitation of an use, or, otherwise, the devise would be utterly void. The principle established by that decision was, that no part of the third acre could be devised; and the will would have been altogether inoperative, if it had not been held to be an execution of the power. In *Cott v. The Bishop of Coventry*, (which was the great case of the *commendam*), Lord Chief Justice *Hobart*, in commenting on *Clere's* case, after stating (*a*) that it was there agreed, that if the devisor had recited his power, and had relied upon that, all would have passed by the express declaration of the party himself, proceeded to say, "nay more, though the party do not make an express declaration; yet if his act do import a necessity to work by his power, or else to be wholly void, the benignity of the law will give way to effect the meaning of the party; and, therefore, in *Clere's* case the devise was good by force of the authority." In *Scrope's* case (*b*), *Nicholas Scrope* was seised in fee of the manors of *H.* and *M.*, and, by indenture, for the preferment of his wife and daughter, covenanted to stand seised of those manors, to the use of himself, his wife, and daughter, for their lives, and afterwards to the daughter and the heirs of her body, with other remainders over, with a proviso, that if *Scrope*, during his life, and after payment of certain debts mentioned in a schedule annexed to the indenture, should be disposed either to determine, disannul, change, alter, enlarge, diminish, or make void the uses or estates, or any of them, or any part thereof, it should be then lawful for him, by his writing indented, under his hand and seal, subscribed in the presence of three witnesses, to determine, disannul, &c.: and

(*a*) *Hobart*, 160.

(*b*) 10 Rep. 143.

also, by the same writing so signed and subscribed, to limit, declare, and appoint the uses of the same to his wife and daughter, or to any other persons. The wife died; and *Scrope* married a second; and by indenture, subscribed in the presence of three witnesses, in consideration of a jointure to be made to the second wife, he covenanted, with two trustees, to stand seized of the manor of *H.*, to the use of himself and his second wife, for their lives, and, afterwards, to the use of his right heirs; and it was resolved, that although there was not any express signification of his purpose, to determine and disannul the uses created by the first deed, yet, as by the last indenture he covenanted to stand seized to the use of himself and his then wife, and afterwards to his right heirs, it enured to two intents; first, to declare his purpose to determine and disannul, and that thereby, *ipso facto*, the former uses ceased; and, secondly, that the covenant in the same indenture enured to raise a new use to him and his second wife, and to his heirs, *quia*, (says Lord *Coke*), *non refert an quis intentionem suam declarat in verbis, an rebus ipsis, vel factis;* and that when he limited new and other uses, he thereby signified his purpose to determine and alter the uses before. In that case, the second deed would have been wholly inoperative, if it had not, by implication, revoked the uses in the first; but the rule there laid down by Lord *Coke* contains larger terms than that to be deduced from *Clere's* case, namely, that if an intent to execute a power be unequivocally manifested by any act of the party, it shall be sufficient, without requiring any specific overt acts of such intent. In *Jenkins v. Keymis* (a), where a father, tenant for life, and his son, tenant in tail, on the marriage of the son with his first wife, levied a fine and suffered a recovery to the use of the father, for life, remainder to the son and the heirs of his body on his wife begotten, remainder to the

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heirs of the body of the son, remainder over, with power for the father, by deed in writing, to charge all and singular the premises with the payment of 2000*l.*; after which the father and son, without recital of the power, by deeds of lease and release, conveyed part to *D. J.* and his heirs, by way of mortgage, for securing 2000*l.* and interest; the Court agreed that, notwithstanding that the power was not recited, it might be a good execution of it, as in *Clere's* case. The authority and principle of the latter case was thereby recognized and adopted, as the lease and release would have been inoperative, if they had not been decided to be an execution of the power in the settlement. In *King v. Melling* (*a*), where a devisee under a will, with a power to jointure, suffered a recovery to the use of himself in fee, and afterwards covenanted to stand seised to the use of his wife, for her jointure, it was held, that as the devisee had got a new fee, though it were defeasible by him in remainder, yet the covenant to stand seised should enure thereupon; and the use should arise out of the fee; and that he was seised in fee: the jointure in that case was made without any reference to his power; and Mr. Justice *Rainsford* and Mr. Justice *Twisden* referred to *Clere's* case. In *Guy v. Dormer* (*b*), the settlor conveyed his estates to trustees, to certain uses, with a proviso, that, if he should at any time thereafter, by any writing, in express words, signify and declare his intention to revoke or make void that deed, the uses should cease; and he afterwards made his will, by which he devised the lands to a different person from him to whom they were limited by the deed; and it was contended, that the will was no revocation of the uses, because the words *by express words* excluded all implicit revocations; yet the Court determined that the will, although not referring to the power, or expressly declaring an intention to revoke, operated as a revocation. That was decided on the principle laid down

(a) 1 Vent. 225.

(b) Sir Thos. Raym. 295.

in *Scrope's* case, *vix.* the intent to revoke, and that, where new uses were limited, the party signified his purpose to revoke the former ones. In *Maddison v. Andrew* (*a*), *Robert Andrew* made a voluntary settlement of real estate on his brother *John*, remainder over to his sisters; but he created a term of 1000 years, vested in trustees, reserving to himself a power, if he should die unmarried and without issue, to charge, limit, or appoint the estate with any sums not exceeding 1000*l.* By his will, he charged all his estates, real and personal, with the payment of all his debts, and certain legacies, and then gave a legacy of 300*l.* to the children of his sister *Sarah*; and it was insisted (among other things) (*b*) that the 1000*l.*, which the testator had power to charge on the real estate, should be assets, or a charge, by the will, for payment of the legacy; and Lord *Hardwicke* was of opinion that it should; for, being a power reserved by the absolute owner of the estate, making a voluntary settlement on his brother, it should be construed liberally, being a reservation of part of the ownership. Then, as to the execution of the power, he had used the word *charge*, which is the word in the power; nor was there any occasion for his referring to the power, if he did it in substance, as in Sir *Edward Clere's* case. The case of *Maddison v. Andrew* is not reported by *Atkyns*, who was a more accurate and discreet reporter than *Vezey*. But his Lordship founded his decision on the ground that the power was in terms referred to in the will, by the testator's using the word *charged*, which was the word used in the power; and by his referring to *Clere's* case, it must be inferred, although it be not stated in the case, that the settlor had settled all his real property on his brother by the deed; and then the will would have been inoperative as to real property, if it had not been held to be a good execution of the power; for all that was decided in *Clere's* case is, that the will must be taken to be an execution of the power,

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because it would otherwise have had no effect. So here, as the will speaks of real property, if the testatrix had no other real estate but that which was settled, it must have reference to that property. But in *Ex parte Caswall* (a), Sir George Caswall, being seized of a copyhold estate, surrendered it to trustees, reserving to himself a power of appointment, by deed or will, and afterwards, by will, gave all the rest, residue, and remainder of his effects, real and personal, of what nature, kind, or quality soever, to his son, George Caswall, Lord Hardwicke said, "though a man may execute a power, without reciting, or taking the least notice of the power, yet it is necessary he should mention the estate which he disposes of, and he must do such an act as shews he takes notice of the thing which he had a power to dispose of. Sir George Caswall had other lands on which the devise to his son might be satisfied." Thus, it appears that the same Judge who decided the case of *Maddison v. Andrew*, held, that the estate, which the party executing the power disposed of, must be mentioned in the will. So in *Probert v. Morgan* (b), his Lordship said, "if a man have a power to charge an estate, it is not necessary, in the execution of it, that he should refer to the deed out of which the power arises; for in a Court of Equity, it is enough that his intent appears; and if in the execution he sufficiently describe the estates he had a power to charge, the estate is certainly bound, especially where the person charging is a purchaser of the power." In *Andrews v. Emmot* (c), John Andrews conveyed 3000L stock, to trustees, by a deed of settlement made on his marriage, reserving to himself, in case there should be no child, a power, by deed or will, to transfer the stock to such persons as he should appoint; and, there being no child, he, by his will, gave "all the rest and residue of his monies and securities for money, goods, chattels, and personal estates, whatsoever and wheresover, and of what nature, kind, or

(a) 1 Atk. 559.

(b) 1 Atk. 441.

(c) 2 Brown's Chan. Cas. 297.

quality soever, to *John Emmot*," (the defendant in the suit); and the question was, whether the will were an execution of the power; and Lord *Kenyon*, (the then Master of the Rolls), referred to *Parker v. Kett* (*a*), where he said he found this rule laid down, *viz.* that "where one has an authority, and does an act which can be good no other way but by virtue of that authority, it shall be understood to have been done by virtue of his authority; but where one has an interest and authority together, and does an act generally, it shall be construed in relation to his interest, and not to his authority." This is the rule laid down in *Cleve's case*. "Then," asked Lord *Kenyon*, "does this devise of the residue necessarily refer to the power over the 3000L? Where a person has other property to answer the disposition, this cannot be included;" and he declared the will not to be an execution of the power. An appeal from this decree was made to Lord *Thurlow*, who confirmed it, and said (*b*), "if a man dispose of that over which he has a power, *in such a manner that it is impossible to impute to him any other intention but that of executing the power* the act done shall be an execution of the power. But the doctrine is not carried by any case further than this, and it would be cruel to do it, as it would be throwing the property of testators into utter confusion." The only distinction, between a power as to real and personal property, is, that, in the one, the Courts will allow inquiry to be made, whether the testator had other property to satisfy the terms of the will; but that in the other they will not, as the will speaks for itself. This shews, that the evidence of an intent to execute a power must be most express and complete. In *Standen v. Standen* (*c*), Lord *Loughborough* said, "By her will, the testatrix gives all her estate and effects. It is hard to say, that, using that expression, she meant to distinguish, and not to include this,

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(*a*) 12 Mod. 469.    (*b*) 2 Brown's Chan. Cas. 303.    (*c*) 2 Ves. 594.

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which is as absolutely her's as any other part of her property." Although that decision be supported by no previous authority, it is founded on sound principles, as, his Lordship justly observed, the testatrix had *no other real estate*. In *Langham v. Nenny* (a), where the testator by will declared his purpose to dispose of his estate and effects, which he had or was interested in, but without noticing, or affecting to make any disposition of, stock in the funds, over which he had a power, it was held, that the power was not executed by the general words of the will, and Lord *Alvanley* there expressed his perfect approbation of *Standen v. Standen*, and said (b), "that he was much inclined to construe the execution of powers, particularly where they are unconfined, as liberally as might be, and that he rather wished the Court had taken another line, and had held that any general words would be sufficient to execute such powers; but that he was not at liberty to say so, as he was bound by previous authorities." In *Nannock v. Horton* (c), the testator, having power to dispose of 4000*l. 3*l. per cent.** Consolidated Bank Annuities, by his will, gave to *Elizabeth Laws*, 2000*l. 3*l. per cent.** Consolidated Bank Stock; it was held, that the power was not executed by the will, as it had no reference to the subject of it, and the Court would not inquire into the circumstances of the property: and Lord *Eldon* there said (d), "there is not in this will any reference whatsoever to the power, nothing having a necessary reference to it, or that can be stated as having any reference, except the words *3*l. per cent.** Consolidated Bank Stock," and his Lordship concluded by saying, "there is nothing in the will that refers to the power; nothing necessarily descriptive of the property over which it existed; and, therefore, whatever might have been the intention, I am bound by the authorities to say, this testator did not mean to affect any property but what was his own." This

(a) 3 Ves. 467.

(b) Id. 470.

(c) 7 Ves. 391.

(d) Id. 399.

is an authority to shew, that no proof of intention, short of that which amounts to demonstration, will be sufficient. In *Bennett v. Aburrow*, where the settlor reserved to himself a power of appointment to £3000*l.* Consolidated Bank Annuities, Sir *William Grant* said (*a*), "it is always a question of intention, whether the party meant to execute the power or not. Formerly, it was sometimes required, that there should be an express reference to the power; but that is not necessary now. The intention may be collected from other circumstances, as, that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power." Although he said it was a question of intention, yet he required the same demonstrative evidence of it as was rendered necessary by previous decisions. In *Bradly v. Westcott* (*b*), Sir *William Grant* said, "I agree that the decision in *Standen v. Standen* is right, and admit it as a binding authority. I dissent only from the argument upon which the Lord Chancellor proceeds. If a testatrix be applying her will to the subject of her power, and I find that she is speaking of the subject of her power, an express reference to the power is not necessary." In *Jones v. Tucker*, Sir *William Grant* drew a distinction between real and personal property, on the ground, that, in a devise of land, the question is, whether there were any thing for the will to operate on, at the time when it was made, whereas a will of personality speaks at the death; and he said (*c*), "if a person, having no property at all, and only a power over a certain sum of money, give that single sum, little doubt can arise as to the intention. But the question is, how we can get at the fact, and, whether there can be an inquiry for the purpose of ascertaining it." In *Jones v. Curry*, Sir *Thomas Plumer*, said (*d*), "the distinction, notwithstanding

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(*a*) 8 Ves. 616.

(*c*) 2 Meriv. 536.

(*b*) 13 Ves. 453.

(*d*) 1 Swanst. 73.

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some expressions of Lord *Rosslyn* in *Standen v. Standen*, being now established between property and power, words containing no direct reference to any particular fund, nothing in description to enable the Court to collect an intention to exercise the power, are not sufficient to designate, with due certainty, property not the testatrix's own, but of which she was empowered to dispose."

On a full consideration of all these cases, we are of opinion, that a will need not contain *express* evidence of an intent to execute a power. But general words, in a devise, however comprehensive, will not make it operate as an execution of such an instrument. The intent to execute must be so clearly demonstrated or manifested by the will, that it is impossible for the Court to impute any other intention to a testator than that of executing it, according to what was said by Lord *Thurlow* in *Andrews v. Emmot*, which was founded on the authority of *Scrope's* case, Here, however, we are of opinion, that it is impossible to impute to Mrs. *Trymmer* any other intention than that of executing the power she had reserved to herself, as to the moiety of the estate in question, which descended to her on the death of her father; and that intent is demonstrated by every part of the will, and particularly by reference to the estate over which she had the power; and if so, the rule as to the evidence of intent has in strictness been complied with. She was seised of one undivided moiety, by purchase, and having a power of appointment; previously created by herself, over the other, she gave *all her freehold estates*, in *London* and the county of *Surrey*, to her nephew, *John Roake*. This is not a description of her interest in these estates, but of the estates themselves, and shews her intent to pass all the real property of which she might be seised, or which she had any right to dispose of, at the time of her death. Besides, she devised the estates, *on condition*, that, out of the rents *thereof*, (that is, out of the rents of the entire property,) the devisee, *John*

*Roake*, should, from time to time, keep such estates in proper and tenantable repair. He could not keep an undivided moiety in repair, he must repair all or none; and he could not perform the condition, unless he were in possession of the entirety, to which the devise clearly referred, and which consequently passed by it, as the repairs could not be effected from the rent of a moiety, but from that of both the estates devised. It appears to us, that the testatrix clearly demonstrated an intent to dispose of the whole of her property, and it was found as a fact, that she had no other tenements in *Surrey*, than those mentioned in the declaration. The condition as to the repairs could not be performed after the death of the first taker, if the second did not take the whole; and as the testatrix expressly directed that all the estates devised should be kept in repair, it must of necessity be inferred that she wished to keep the estates united, and that the same person should take the whole of her real property, as far as she had power to dispose of it; and as both moieties of the estate in *Surrey*, were originally united and comprised under one title, she was not only anxious for its being kept in repair, but the limitations in her will are so framed, as to continue the property in her own family, as long as possible. On these grounds we are of opinion that there must be

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#### Judgment for the defendants.

HEDGES *v.* CHAPMAN and COUSENS.

Monday,  
Feb. 7th.

THIS was an action of trespass, for an assault and false imprisonment. The first count of the declaration stated,

Where to an  
action of tres-  
pass and false  
imprisonment,

against *A.* and *B.*, they pleaded *jointly*, that the horse of *A.* having been taken out of his cloe, without his consent, and found in the plaintiff's stable, and that *A.*, having strong grounds to believe, and believing, that the horse had been stolen by the plaintiff, gave charge of him to *B.*, a constable, in order to his being taken before a magistrate, and that the plaintiff resisting and assaulting *A.* and *B.*, they defended themselves, and took him to a police office:—Held, ill on demurrer, it affording no ground of justification to *A.*; and that, being bad as to him, it was bad as to both *A.* and *B.*

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that the defendants assaulted the plaintiff, struck him with a crow bar, and forced him to go as a prisoner, along divers public streets, to a watch-house, and from thence to a police-office, and to be there examined, as a prisoner, before a Justice of the Peace, on a certain false and unfounded charge of felony, which charge was dismissed by the Justice. There were other counts for falsely imprisoning the plaintiff, assaulting him, and for taking his horse, and converting the same to the use of the defendants.

The defendants pleaded *jointly*, first, the general issue, secondly, as to the trespasses in the first count of the declaration, that, before the said time when, &c. a certain horse, of the defendant *Chapman*, had been, without his knowledge, leave, or consent, driven, taken, and led away, from and out of a certain close of *Chapman's*, situate, &c. and had been forced and driven over a certain high fence, surrounding the said close; and that the defendant *Chapman*, for these reasons, believing the horse to have been feloniously stolen, taken, and led away; and finding him in the possession of the plaintiff, in a certain stable of the plaintiff, situate, &c. and for these reasons having strong and vehement grounds to suspect and believe, and suspecting and believing, that the said horse had been feloniously stolen, taken, and carried away by the plaintiff, he the defendant *Chapman*, just before the said time when, &c., to wit, on, &c., requested the defendant *Cousens*, who was a constable, and peace-officer, to re-take the horse of him, *Chapman*, and then and there gave charge of the plaintiff, to the defendant *Cousens*, for having feloniously stolen, taken, and carried away the said horse, and requested *Cousens* to take the plaintiff into custody, and to convey him and the horse before some or one of his Majesty's Justices of the Peace, in order that the plaintiff might be examined by and before such Justice or Justices, touching the said offence, and be further dealt with according to

law; that thereupon the defendant *Cousens*, as such constable and peace-officer, and the defendant *Chapman*, in his aid and assistance, and by his command, just before the said time when, &c., to wit, on, &c., attempted to re-take the said horse, and gently laid their hands on the plaintiff, in order to take him into custody on the said charge, and for the purpose aforesaid, whereupon the plaintiff, and divers servants of his, with force and arms, violently resisted the said attempt of the said defendant *Cousens*, as such constable, and of the said defendant *Chapman*, so acting in his aid and assistance, and by his command, to re-take the said horse, and take the plaintiff into custody, as aforesaid; and the plaintiff and his said servants, then and there, with force and arms, &c. assaulted the defendants, and would have beat, wounded, and ill-treated them, if they had not immediately defended themselves against the said assaults of the plaintiff and his servants; whereupon they did respectively defend themselves against the said assaults, and overcame the resistance of the plaintiff and his servants, and re-took the horse, and seized and laid hold of, and took the plaintiff into custody, on and for the said charge, for the said felony, and brought and conducted him as a prisoner, and in custody, in and along the said public streets, to the said watch-house, and from thence to the said police office, in the first count of the said declaration mentioned, the same being at a considerable distance from the place where the plaintiff was taken into custody as aforesaid, to be there, to wit, at the said police office, examined; and that he was then and there examined by and before a Justice of the Peace, upon and touching the said charge; and that the plaintiff was, on those occasions, necessarily and unavoidably imprisoned and detained in prison, as in the first count mentioned, as was lawful for the cause aforesaid; and that if any hurt or damage was done or occasioned to the person of the plaintiff, as in the first count mentioned, the same was

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done and occasioned by the resistance of the plaintiff to the defendant *Cousens*, as such constable, and the defendant *Chapman*, so acting in his aid and assistance, and by his command, and by their lawful endeavours to overcome the same, and in the necessary defence of themselves against the same, which were the same supposed assaults and trespasses, in the introduction to that plea mentioned, and whereof the plaintiff had above thereof complained against them; without this, &c. The fourth plea was similar in terms to the second, the defendant *Chapman* justifying on the grounds above stated, and that he acted in aid of the defendant *Cousens*, as such constable, for the purpose of taking the plaintiff before a magistrate.

The plaintiff demurred generally to these pleas, and the defendants joined in demurrer. Issue was joined on the first, third, and several other pleas, in which the assault and imprisonment were attempted to be justified.

Mr. Serjeant *Vaughan*, in support of the demurrer, submitted that the second and fourth pleas could not be supported, as the defendants had pleaded *jointly*, and the defendant *Cousens* only could justify the assault and imprisonment, as acting in his character of constable; and that the charge of felony imputed to the plaintiff by *Chapman*, was not shewn to be well founded, as it was merely stated that *Chapman* had strong grounds to believe that his horse had been stolen. In *Duffield v. Scott*, Mr. Justice *Buller* said (a), "where two persons join in a justification in trespass, if the plea be bad for one, it is also bad for both;" and in a note by Mr. Serjeant *Williams*, to the case of The Earl of *Manchester v. Vale* (b), it is said, that "if two or more join in a defence, which is a sufficient justification for one, but no justification for the others, the plea is bad as to all; for the Court cannot sever it, and say that

(a) 3 Term Rep. 377.

(b) 1 Wms. Saund. 28, (n. 2)

one is guilty, and the others not, when they all put themselves upon the same terms"; and several authorities are cited, in support of that position. In *Samuel v. Payne* (*a*), it was held, that a peace-officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear, that no felony had been committed; but that a private individual cannot. Here, therefore, it is clear, that *Cousens* alone could be justified in taking the plaintiff before a magistrate, and if so, the plea is bad as far as it regards *Chapman*. It was through his means that the plaintiff was given in charge, and that was the origin and foundation of the assault. He (*Chapman*) was the prime mover, and the constable acted under his direction, and if death had ensued from the plaintiff's resistance, he would not have been guilty of murder. *Chapman* should have applied to a magistrate, for a warrant, in the first instance, and if he had caused it to be sued out maliciously, the plaintiff would have had his remedy by an action on the case. In *Hawkins's Pleas of the Crown* (*b*), it is laid down, that "whoever would justify the arrest of an innocent person, by reason of any suspicion, must not only shew that he suspected the party himself, but must also set forth the cause which induced him to have such a suspicion, that it may appear to the Court to have been a sufficient ground for his proceeding, and he ought expressly to shew, that the very same crime for which he made the arrest, was actually committed." In *Murs v. Kaye* (*c*), Mr. Justice *Heath* said, that "to make good a justification of an arrest by a private person, on suspicion of felony, it is necessary for the defendants to shew, by pleading, that they had *reasonable cause* of suspicion, upon which they acted." In *Stonehouse v. Elliott* (*d*), it was held, that if *A.* having been robbed, suspect *B.* to be guilty, and take him, and

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(*a*) 1 Doug. 359.

(*c*) 4 Taunt. 44.

(*b*) Book 2, c. 12, § 18.

(*d*) 6 Term Rep. 315.

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deliver him into the charge of a constable present, *B.* (if innocent), may maintain trespass against *A.* That case was far stronger than this, as there the constable was present at the time, to whom *A.* had previously communicated his suspicions. There, too, the action was confined to the party who gave the plaintiff in charge; and here, as both the defendants are sued, they should have pleaded severally; and as the defendant *Chapman* caused the plaintiff to be apprehended in the first instance, it was incumbent on him to shew, on the face of his plea, that he had a reasonable cause for suspecting the plaintiff of felony.

Mr. Serjeant *Taddy*, *contra*.—The case of *Stonehouse v. Elliott*, is altogether distinguishable from the present; as it does not appear that any special plea was put on the record, and the assault was committed by the defendant, before he gave the plaintiff in charge to the constable. Here, however, the defendant *Chapman* requested the constable to re-take his horse, and then gave the plaintiff in charge, on his refusing to deliver him up. Although the making such charge might be wrongful in the first instance, yet this action cannot be maintained, according to the distinction laid down by Mr. Justice *Ashurst*, in *Morgan v. Hughes* (*a*), and to which Mr. Justice *Buller* assented, *viz.* that “where the act of imprisonment by one person is in consequence of information from another, there an action on the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other. Here *Chapman* was not the first mover, but acted in aid of the constable, who was the immediate cause of the plaintiff’s imprisonment. The complaint by *Chapman*, and giving the plaintiff in charge to the constable, as stated in the early part of the plea, can only subject the former

(a) 2 Term Rep. 231.

to an action on the case; and as the actual taking was by the constable, he must be considered as the principal; he had a discretion to act or not, but having decided on so doing, the defendant *Chapman* was justified in assisting him; and it is stated, that he acted in aid and assistance of *Cousens* and by his command; and whether the previous charge were made by *Chapman* or a third person, as the present action is founded on the arrest, the constable alone is responsible; at all events, *Chapman* was warranted in acting in his aid. In *Mure v. Kaye*, it was not stated in the plea, how, or at what time the plaintiff became possessed of the note, which he was suspected of having disposed of: nor were any circumstances stated, which could enable the Court to judge whether there were a reasonable ground of suspicion to justify the arrest. Here, however, it is stated in the pleas, that the horse of the defendant *Chapman* had been taken out of his close, and was found in the possession of the plaintiff; and if he had not called in a constable, the case of *Stonehouse v. Elliott* might have applied, but the plaintiff, by demurring, has admitted that the constable was called in, and that the defendant *Chapman* acted in his aid, and by his command; and if the plea had alleged, that a charge had been made against the plaintiff for stealing the horse, and that the constable, when arresting him on that charge, called on *Chapman* to assist him in taking the plaintiff before a magistrate, it would have been a good plea; here it appears, that the plaintiff resisted their attempting to do so. In the *Year Book* (a), the Court seems to have thought, that if the cause of suspicion should appear reasonable, the justification would be good, although no felony had been committed; and sufficient appears on the face of these pleas to shew a reasonable ground of suspicion that a felony had been committed, and that the defendant *Chapman* had

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(a) 7 Hen. 4, p. 35, pl. 3; S. C. 1 Doug. 360, n.

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good grounds for believing that the plaintiff had stolen his horse.

Lord Chief Justice Best.—It is perfectly clear, that, whether a felony have been committed or not, if an individual charge a constable to take a person into custody, no action can be maintained against the constable, as it is his duty to act on such a charge being made to him in his character of a public officer. But the individual, who is not bound to act, ought not to arrest another in the first instance, unless he have reasonable ground of suspicion; a mere surmise is not sufficient. If, indeed, a felony have been committed, but not brought home to the party charged, he would be improperly taken into custody. Here, if *Cousens*, the constable, had pleaded separately, and alleged that the defendant *Chapman* had charged him to take the plaintiff into custody, it would have been a good plea; but both the defendants have joined in the same plea, alleging that *Chapman*, being possessed of a horse, which had been taken out of his close without his consent, (not stating that the horse was feloniously taken, and he therefore might have been taken by mistake), and finding him in the plaintiff's stable, he (*Chapman*) having strong grounds to believe, and believing that the horse had been stolen by the plaintiff, requested *Cousens*, the constable, to take the plaintiff into custody, and to convey him and the horse before a magistrate, which both the defendants eventually succeeded in doing. Unless that plea amount to a justification for both the defendants, it must fall to the ground, as if it be bad in part, it is bad as to the whole; for it would only be a good defence for *Cousens*, and cannot afford an excuse or justification for *Chapman*. The case of *Stonehouse v. Elliott* is an authority to shew, that if the plea be bad as to *Chapman*, he is liable to an action of trespass at the plaintiff's suit. It has been said, however, that trespass

can only be maintained where the party who first made the charge is the immediate cause of the imprisonment; but there is no distinction in law, whether the person charging another lay hands on him himself, or ordered another to do so. Here the defendant *Chapman* charged the plaintiff to be taken into custody, in the first instance, and he was accordingly imprisoned under that charge; and the plea should justify the original imprisonment. *Chapman* was the *causa causans*; and he has not shewn a valid or legal defence to the action in either of the pleas demurred to; if he can prove that the plaintiff took the horse *animō furandi*, it may avail him under the general issue. But the only question for us to decide is raised by the second and fourth pleas, to which alone our attention has been drawn; and as they are entire, and the constable has imprudently joined himself with *Chapman*, I am clearly of opinion that the plaintiff is entitled to judgment.

**Mr. Justice PARK.**—I am of the same opinion, on the principle, that where a plea is entire, and not divisible, if it be bad in part, it is bad as to the whole.

**Mr. Justice BURROUGH.**—Both the pleas demurred to are bad in substance. The defendants have admitted the trespass; and *Chapman*, who was the prime mover, has sought to protect himself, by stating that he acted in aid of the constable, which, in fact, amounts to nothing; for, as *Chapman* has shewn no reasonable cause of suspicion, he must be considered as the original aggressor; and, therefore, this demurser may be sustained.

**Mr. Justice GASELEE.**—We shall not be doing any injustice to the defendants by holding that these pleas are bad, and cannot be supported; as, if they can substantiate by

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evidence, that the horse was feloniously taken by the plaintiff, they may go down to trial on the other pleas.

### Judgment for the plaintiff.

*Tuesday,*  
*Feb. 8th.*

A plaintiff in an action for slander having obtained leave to amend his declaration by adding counts, the defendant pleaded a justification, and the plaintiff afterwards obtained a further order to amend, by adding other counts, and the defendant had a rule to plead *de novo*: Held that he could not afterwards apply to strike out some of the counts, as being unnecessary or superfluous.

### THOMAS v. JACKSON.

THIS was an action for slander. The declaration contained thirty-three counts, many of which set out words not actionable, and some varied in a very trifling degree from the others; for instance, the first charged the defendant with having said of the plaintiff, that he was a rogue and swindling rascal; the second, that he was a rogue and a villain; the third, that he was a rogue and shabby rascal; the fourth, that he was a rogue; the fifth, that he was a swindling rascal, and so on.

Mr. Serjeant *Vaughan* having, on a former day in this Term, obtained a rule *nisi* that it might be referred to the Prothonotary to strike out several of the counts, as being superfluous and unnecessary,—

Mr. Serjeant *Bosanquet* now shewed cause, and contended, that the application was made too late; and he produced affidavits, which stated that the plaintiff had, in Michaelmas Term, 1823, first delivered his declaration, which was drawn in concise terms; that the defendant, in the following Hilary Term, pleaded a justification, when the plaintiff obtained leave to amend his declaration, and delivered one containing thirty counts; that the defendant, in Trinity Term, 1824, again pleaded a justification in nearly the same terms as before, on which the plaintiff took issue, gave notice of trial at the next ensuing Assizes, when he entered the cause, but afterwards withdrew the record; that the defendant in the last Term obtained a rule *nisi* for

judgment, as in case of a nonsuit, which was discharged or the plaintiff's giving a peremptory undertaking to try at the next Assizes; and that, just before the commencement of the present Term, the plaintiff obtained a further order to amend, by inserting three additional counts; and the defendant had a rule to plead *de novo*, which he had allowed to expire; and that the cause now stood for trial at the next Assizes.

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Mr. Serjeant Vaughan, in support of the rule, submitted, that, after the defendant had obtained the rule to plead *de novo*, he was in the same situation as if he had made this application when the plaintiff had obtained his last order to amend; and as he added three new counts, it must be considered as a new declaration; and, if so, the defendant is entitled to treat it as if it had been delivered for the first time.

But, *per Curiam*—The defendant should have made an earlier application. Although he had leave to plead *de novo*, it would not have the effect of allowing him to apply to the Court to strike out some of the counts, as being unnecessary or superfluous. He should have raised the objection at the time the order was made for the last amendment; and although that order was opposed before a Judge at chambers, no such objection was raised; and the effect of this application is, to add to, rather than decrease, the costs. The declaration, as amended in the first instance, consisted of thirty counts, on which the cause was entered for trial; and the costs must necessarily have been incurred by inserting an abstract of the 'pleadings' in the briefs; but as the defendant did not object to either of those counts, when the last order was made for the insertion of three others, and to which he assented, on the terms of being allowed to plead *de no-*

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so, the present application is clearly too late. This rule, therefore, must be

Discharged with costs (a).

(a) See *Law v. Williamson*, Hil. 31 Geo. 3. *Impey's C. P.* 6th Edit. 170.

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Feb. 8th.

West and Another, Assignees of Price, a Bankrupt, v.  
PRYCE.

Costs of a judgment as in case of a nonsuit entered up against the plaintiff after his becoming bankrupt, cannot be set off, by the defendant, against the costs of another action, brought against him by the assignees, for the same cause.

A RULE had been obtained, on a former day in this Term, by Mr. Serjeant *Pell*, calling on the plaintiffs to shew cause why it should not be referred to the Prothonotary to tax the defendant's costs in an action which had been brought against him by *Price* before he became bankrupt, and to set off or deduct the amount of the taxation of the costs in that cause, from the damages and costs in the present. The motion was founded on an affidavit of the defendant's attorney, which stated that an action was brought against the defendant, in this Court, by *Price*, before he became bankrupt, to recover the value of a horse sold by him to the defendant; that the cause stood for trial at the sittings after *Trinity Term*, 1823, when *Price* withdrew the record, and, having neglected to enter the issue, the defendant's attorney, in the *Michaelmas Term* following, *viz.* on the 10th *November* in that year, gave the usual rule for that purpose, and served notice accordingly on *Price's* attorney, who, on the 18th, sued out the commission; that a rule for judgment, as in case of a nonsuit, was obtained on the 22nd, which was made absolute on the 27th, in the action by the bankrupt against the present defendant; that an advertisement, declaring *Price* a bankrupt, was in the *Gazette* on the 22nd; that the costs of the nonsuit had not been taxed or paid; and that the present action, at the suit of the assignees, was tried at the

first Sittings in this Term, when they obtained a verdict for £6*l.*, being the value of the horse; and that the action brought by the plaintiffs as assignees was for the same cause as that originally brought by the bankrupt himself.

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Price.

Mr. Serjeant Vaughan now shewed cause, on an affidavit of the bankrupt's attorney, which stated, that the commission actually issued against Price on the 18th November; that he did not receive the rule for judgment, as in a case of a nonsuit, until the 22nd; and that at the time it was made absolute, no assignees were appointed, as such appointment did not take place till the 5th December following. Under these circumstances it was submitted, that as the rule for judgment as in case of a nonsuit, was not made absolute until more than a week after the commission had issued against Price; he had then no interest in any property he might have previously had; and, as no assignees had been appointed, the rule could not be resisted, so that the plaintiffs were obliged to resort to the present action. And although the costs in the former action, if taxed, would become a debt due from the bankrupt, proveable under his commission, yet that, if the present application were to succeed, it would deprive his assignees of the costs due to them on the verdict they had obtained; and as their interests had intervened since the bankruptcy, there was no mutual credit between them and the defendant; and, as they stand in a different situation from the bankrupt, the costs of the former action cannot be set off against the present; for in *Doe v. Darnton* (a), the Court would not allow one judgment to be set off against another, where the interests of third persons had intervened.

Mr. Serjeant Pell, in support of the rule, contended,

(a) 3 East, 149.

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Patch.

that the costs in the former suit might be set off against the damages and costs of the present, as they were not incurred in different rights. That the rule for the judgment of nonsuit having been made absolute before the bankruptcy, there could be no doubt but that the costs of the first action might be set off against those of the present; and that the bankrupt's attorney requested the proceedings to be stayed until it was discovered that he had caused the commission to be issued. That the bankrupt and the assignees set up their claims against the defendant in the same right, and sued him for the same cause of action; and in *Watt v. Hart* (a), it was held, that if a plaintiff become bankrupt, after nonsuit, and before judgment of nonsuit, the costs of the nonsuit are a debt proveable under the commission; and if so, it is quite clear, that they might be set off against any claim by the assignees on the defendant; at all events, the Court, in the exercise of their equitable jurisdiction, will allow the taxed costs of the one action to be set off against those of the other, on the terms as prayed.

Lord Chief Justice Best.—It is quite clear, that we have a general jurisdiction, and this accords with the practice of all the other Courts, to allow the costs of one action to be set off against another; but if we were to exercise it as now prayed, it would be carrying the doctrine as to set-off much further than law or justice would warrant us. What are the facts? An action was brought against the defendant by a party who was nonstated, but who became bankrupt before the judgment of nonsuit was signed, or costs taxed. The costs of the nonsuit were either proveable under the commission or not. But that appears to me to be immaterial. If they were, the defendant must resort to such proof; if not, he must look to the bankrupt. But the ground on which I rest my opinion, is, that this is not

(a) 1 Bos. & Pul. 134. See, also, *Hart v. Mead*, 5 Term Rep. 365.

a case of mutual credit, as both claims did not exist or accrue previously to the bankruptcy, the interest of the assignees having intervened, as in *Doe v. Darnton*. Besides, the claims were not made by the same parties, nor under the same interests; and in order to constitute a set off, each of the parties must be both debtor and creditor in the same right. The damages and costs in the last action belong to the plaintiff as assignees, as they obtained the verdict: we therefore cannot allow the defendant to deduct the costs of the cause in which the bankrupt was unsuccessful, on a motion of this description; for the parties and interests are wholly different. The bankrupt stands in a situation totally distinct from that of his assignees; and the defendant may have his remedy against him, as in *The King v. Davis* (*a*), where the costs of a suit in Chancery being directed to be paid, by an award, made before the bankruptcy of the defendant, but not being taxed till after he had become bankrupt, it was held that they could not be proved under the commission, but that the bankrupt remained liable to be attached for the amount, under the award, it having been made a rule of Court.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—In order to constitute a set-off, the debts intended to be set off must be mutual, and due in the same right; and the parties, though not nominally, must be substantially, the same; and it is an established principle, that a joint debt cannot be set off against a separate demand, nor a separate debt against a joint demand. So here the bankrupt and assignees must be considered as distinct parties; and there was no mutual credit between the latter and the defendant.

Rule discharged.

(*a*) 9 East, 318.

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Wm W.  
P. T. C.

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Tuesday,  
Feb. 8th.

## PRESS v. PARKER.

Devide to R. P.,  
of " all that my  
freehold mea-  
suage, &c. situ-  
ate, &c. where-  
in R. P. now  
lives," and to  
A. P., of " all  
that my free-  
hold mea-  
suage  
&c. situate; &c.  
now in, the occu-  
pation of J. E."  
a coal-cellar,  
within the  
boundary of the  
premises devi-  
sed to A. P., had  
always been  
used by the test-  
ator, and was,  
at the time of  
the will, in the  
occupation of  
R. P.:—Held,  
that evidence of  
such occupation  
by him was  
conclusive, al-  
though it was  
proposed to  
shew that the  
cellar was situ-  
ate within the  
boundary line of  
the house devi-  
sed to A. P.;  
and, therefore,  
that it passed to  
R. P. under the  
will.

THIS was an action of trespass, for breaking and enter-  
ing the plaintiff's closet and coal-cellar, and breaking  
down the walls thereof. The defendant pleaded, first, the  
general issue; secondly, a special plea, alleging that he was  
seized of the soil and freehold of the *locus in quo*, in right  
of his wife; and lastly, *liberum tenementum*; on each of  
which issue was taken.

At the trial before Lord Chief Baron *Alexander*, at the  
last Summer Assizes for Cambridge, it appeared that the  
plaintiff and defendant occupied two houses adjoining each  
other, the defendant's fronting the street, and the plain-  
tiff's being behind it, both of which had originally be-  
longed to the plaintiff's father. The plaintiff and de-  
fendant claimed under his will, duly executed and attest-  
ed, and dated the 20th September, 1822, and which con-  
tained the two several devises following, *viz.* First " I  
give and devise unto my eldest son, Robert Press (the  
plaintiff), all that my freehold mea-usage or tenement, situate  
in the parish of the *Holy Trinity*, in Cambridge,  
wherein he now lives, with the yard, back estate, and pre-  
mises thereto belonging, part of which is now in my own  
occupation, and other part whereof is in the occupation  
of Mr. Chapel and Mr. Moore, to hold the said mea-usage  
or tenement, hereditaments, and premises, with the appur-  
tenances thereto belonging, unto my said son Robert Press,  
his heirs and assigns; but if my said son Robert Press  
should happen to die, without having any children or child  
living at the time of his decease, then I order, direct, and  
authorize my executors hereinafter named, or the survivor  
of them, or the executors or administrators of such sur-  
vivor, to sell and dispose of the said mea-usage or tenement,  
hereditaments and premises, by auction, to the best bidder,

and to make a good and sufficient conveyance thereof to the purchaser or purchasers of the same premises." "Also I give and devise unto my eldest daughter, *Ann Parker* (the defendant's wife), all that my freehold front messuage, or tenement in *King Street*, in the said parish of the *Holy Trinity*, with the appurtenances thereto belonging, now in the occupation of —— *Edwards*, with a right of way and passage, from time to time, and at all times, into, out of, and from, the yard adjoining to the same, and the use of the pump and privy, being in the said yard; to hold the said messuage or tenement, and hereditaments, with the appurtenances thereto belonging, unto my said daughter *Ann Parker*, for and during her natural life, she keeping the same messuage or tenement in good repair; and after her decease, I give and devise the same to my grand-daughter, *Mary Ann Parker*, daughter of the said *Ann Parker*, her heirs and assigns, for ever." It also appeared, that in the year 1791, the testator purchased the premises devised to the plaintiff, and afterwards built the house devised to the defendant's wife; that the testator occupied the plaintiff's house, from the time of the purchase, until within about four years previous to the trial, during which latter period the plaintiff had lived in it: that both the plaintiff and his father had always used and occupied the coal-cellar; that it was divided from the defendant's premises by a partition; that the only entry to it was on the plaintiff's side; and that the defendant removed the partition for the purpose of making a staircase. The defendant called a witness to prove that the cellar was within the boundary of his house; and that the testator had put up the partition for a mere temporary purpose. He was about to call other witnesses to substantiate these facts, when his Lordship interposed, observing that such testimony was unnecessary, the only question being upon the construction of the will, and what the testator had devised; and, that even admitting that the cellar was within the

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boundary of the defendant's house, he was of opinion, that whatever was in the occupation of the plaintiff at the time the will was made, would pass to him under it; and he told the Jury, that the only question for their consideration was, the fact of the occupation of the cellar, which the plaintiff had proved. They accordingly found a verdict for him, damages 3*l.*

Mr. Serjeant *Wilde*, having, in the last Term, obtained a rule nisi, that this verdict might be set aside, and a new trial granted, on the ground, that the evidence offered on the part of the defendant, to shew the locality of the cellar, had been improperly rejected; and secondly, that the Jury had been misdirected: and he submitted, that whether the cellar were parcel or no parcel of the house devised to the defendant's wife, could only be proved by parol evidence; and that, as it formed part of that house, the question was a matter of law and not of fact; and he cited *Druce v. Denison* (a), where Lord *Eldon* held, that parol evidence is admissible on a latent ambiguity, to explain what is parcel of the premises granted or conveyed.

Mr. Serjeant *Taddy* was now about to shew cause, when the Court called on

Mr. Serjeant *Wilde*, to support his rule.—He submitted, that the witnesses, who were about to prove that the coal-cellars were within the boundary line of the defendant's premises, were improperly rejected; and that the fact of occupation should not have been left as it was to the Jury. That the mere occupation was not sufficient to establish the right; the mention of it in the devise being mere matter of description; that no more could pass under the will than originally belonged to the freehold; and that whether

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or not the cellar in question were part of the freehold, depended on its being within the boundary of the plaintiff's house, or of that devised to the defendant's wife. In *Paul v. Paul* (a), lands at *B.* in the tenure and occupation of *J. S.*, devised by will, were held to comprise woods and timber excepted in a lease to *J. S.*:—the words, “in the the tenure of *J. S.*,” being mere words of additional description. So here, the words in the occupation of *Edwards*, are not restrictive, but descriptive only. If a person devise an estate in the occupation of *A.*, it will not limit it to the part actually occupied by *A.*; and if so, the devise to the testator's daughter cannot be restrained by the mere introduction of the name of the occupier at the time the testator made his will. In *Goodtitle d. Radford v. Southern* (b), a testator devised “all that his farm, called *Trogues Farm*, then in the occupation of *A. Clay*,” and it was held not to be of necessity limited to the lands of *Trogues Farm*, in the occupation of *Clay*, but that it might be shewn by evidence to extend to other lands of *Trogues Farm*, not in his occupation; and there, the will of the original devisor was produced, to shew that part of the farm devised, called *Trogues*, was in the occupation of another. So here, it might have been shewn, to which house the cellar originally belonged, and that was the question which should have been left to the Jury. Although in *Doe d. Browne v. Greening* (c), where a testator devised “all the estate and interest whatsoever, which he had or could claim, either in possession or reversion, of or in any lands or tenements at *Coscomb*:” it was held, that evidence was not admissible, that another estate not at *Coscomb*, was formerly united, and had been ever since enjoyed, with the estate at *Coscomb*, in order to shew that it passed under the devise: and in *Doe d. Chichester v. Oxenden* (d), a devise of “my estate of *Ashton*,” the testator

(a) 1 Sir W. Bl. 255.

(c) 3 Mau. & Selw. 171.

(b) 1 Mau. & Selw. 299.

(d) 3 Taunt. 147.

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having a maternal estate comprehending a manor, and capital farm and lands, in the parish of *Ashton*, as well as several other estates, some in the adjacent parishes, some ten and fifteen miles distant; it was held, that evidence was not admissible to shew, that he was accustomed to call all his maternal estate, his "*Ashton* estate," to raise the inference, that he meant to devise the whole by that name:— yet here, the coal-cellar was not appendant to the house devised to the plaintiff, as it was within the ambit of the defendant's; and if so, the question is, whether the testator intended that it should pass to the former: and as evidence was excluded, to shew that it originally belonged to, and formed part of, the defendant's house, the mere occupation of it by the testator and his son, would not warrant the Court in drawing a conclusion that it passed to the latter. In *Down v. Down* (a), where a testator devised his messuage, farm and lands, called *C. Farm*, situate in or near the parishes of *D.*, *W.*, and *T.*, then on lease to *F.*, at a yearly rent:—it was held, that a close in the parish of *D.*, theretofore arable, and part of *C. Farm*, and occupied with it by the lessee thereof, but for thirty-three years past sown with acorns, and occupied by the owner, and excepted out of two leases of *C. Farm*, the one prior, and the other subsequent to the date of the devise, passed by it, as parcel of *C. Farm*. So here, the cellar might pass to the testator's eldest daughter, although severed from the former occupation; and as the unity of possession was originally in the testator, the only question is, to whom the cellar now belongs, which will depend on the terms of the will, and not on the mere circumstance of occupation at the time it was made. The mere separation of enjoyment or occupation cannot extend or limit the terms of a devise; and if so, the question which should have been left to the Jury in this case is, to which of the houses the cellar in question

(a) 1 B. Moore, 80; S. C. 7 Taunt. 343.

belonged, and whether its being severed by the devisor from the house of which it originally formed part, will have the effect of passing it to the plaintiff, under the first clause in the will, is a question for the consideration of the Court.

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Lord Chief Justice Best.—If I now felt that the conclusion to which I have arrived would interfere with any previous decisions, I should pause before I came to a final determination; but all the cases which have been cited, in support of the defendant's application for a new trial, are distinguishable from this, both in facts and circumstances. I shall, therefore, shortly refer to each of them, for the purpose of shewing that they are unconnected with the present question. In *Doe d. Browne v. Greasing*, the testator devised all the estate and interest whatsoever, which he had, or could claim, of or in any lands, tenements and hereditaments at *Coscomb*; and evidence was offered to shew that another estate, not at *Coscomb*, was once united to, and had since been enjoyed with, it. So, in *Doe d. Chichester v. Oxendon*, where the testator devised his estate of *Ashton*, evidence was offered to shew that he was accustomed to call all his maternal estate, his *Ashton* estate, to raise the inference, that he meant to devise the whole by that name. In both these cases there was a local description of the property, by which the testators clearly shewed that they did not intend, that lands out of the boundaries of those estates should pass; and all that the Court decided was, that no evidence could be admitted to give a different sense to words of the testator, denoting a local and not a general description. Whether parol evidence can be received, in a Court of law, to ascertain the local boundary of property devised, is now *sub judice* in a case in the House of Lords. Where, however, a devise is limited to a local description of property, evidence cannot be admitted to shew that any thing, beyond

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what the testator himself had denoted, should pass. But here there was no local limit; nor was any evidence as to occupation rejected at the trial. In *Paul v. Paul*, the testator devised to his wife "his farm at *Bovington*, in the tenure and occupation of *John Smith*;" in the demise to *Smith* there was an exception of all the woods and timber, and it was held that they passed under the will; and Lord *Mansfield* said, "The words, 'in the tenure and occupation of *John Smith*,' are not words of restriction, but of additional description; and had the testator meant them as restrictive, he would have said, all that *part* of my farm, or *so much* of my farm, as is in the tenure, &c." There, too, the question was between the devisee and the heir at law; and the decision was perfectly right, as the testator intended that all his farm at *Bovington* should pass, and it was sufficiently distinguished by the words, "at *Bovington*." So, in *Down v. Down* the testator devised his farm and lands called *Coltsfoot Farm*; and the question was, whether a close which had formerly belonged to, and been occupied with, but afterwards separated from it, for the convenience of the lessor, was intended to pass under the devise of the farm. There, the leases in which the close was excepted, were the strongest possible evidence to shew of what the farm originally consisted; for the close in dispute being excepted, it shewed to demonstration, that, but for such exception, it would have passed under the devise of the farm. There, too, the question was between the devisee and the heir-at-law. The case of *Goodtitle d. Radford v. Southern* is not favourable to the defendant. There the devise was "of all that my farm and lands called *Trogues Farm*, now in the occupation of *A. Clay*;" and it was held to be not necessarily limited to the lands of *Trogues Farm*, in the occupation of *A. Clay*; and the will, under which the devisor took, was produced in evidence, to shew that the original testator had devised to the former, two closes, not in the occupation of *Clay*; to

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rebut which, a notice to quit was given in evidence, by which the testator required the possession of all his lands, belonging to, and called *Trogues Farm*, to be delivered up; and Lord *Ellenborough* there said "parcel or no parcel is always a question of evidence for a Jury." So here, if the Lord Chief Baron had left it to them to say, whether the cellar in question were parcel or no parcel, or, in other terms, whether it formed part of the ~~premises~~ devised to the plaintiff, or to the testator's eldest daughter, it would have fallen precisely within that case; and although, perhaps, the most accurate way of leaving it to the Jury would have been, whether it were parcel of the one house or the other, yet a mere inaccuracy must not be looked at; for if the substance of a case be left to a Jury, it is sufficient: "for," said Lord *Ellenborough*, in *Goodtitle v. Southern* (a), "it was competent to shew, if there were any doubt, that the two closes were parcel of *Trogues Farm*, by which name the thing devised was sufficiently ascertained. The testator certainly contemplated those closes as parcel of *Trogues Farm*, when he gave the notice to quit. That is clearly an exposition of the description which he used in his will. As to the argument, that the words of the devise are satisfied, by applying them to the farm in *Clay's* occupation, and therefore cannot be extended to the closes in question, it may be answered, that if those closes were parcel of *Trogues Farm*, the word 'all' in the devise would not be satisfied without including them. The testator was mistaken as to the person in whose occupation the two closes were; but the devise is sufficiently comprehensive. It is clear that he meant to pass all which was called *Trogues Farm*, which is a plain and certain description; and the defective description of the occupation will not alter the devise." It was, therefore, held in that case to be entirely a question of evidence as to what estate was intended to pass by the will; and evidence has been admit-

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ted here, not only as to the fact of occupation, but to shew the state of the property at the time of the devise, which was the real question to be determined. If the second devise had stood alone, the case might have fallen within that of *Paul v. Paul*, as "all my freehold front messuage or tenement" might have passed the whole dwelling; and the words, "now in the occupation of *Edwards*," might be deemed mere words of description. But it is a well known and established rule, that the Court must look at the whole of a will, and the situation of the testator at the time of making it; and then the evidence as to the occupation, in this case, becomes most important. The testator, when he made his will, was the owner of both the houses, and had a right to divide and give them as he pleased; and in the first clause of the will, he says, "I give and devise to my eldest son, *Robert Press*, all that my freehold messuage or tenement, situate in the parish of the *Holy Trinity* in *Cambridge*, wherein he now lives, with the yard, back estate, and premises thereto belonging, part of which is now in my own occupation, and other part thereof is in the occupation of Mr. *Chapel* and Mr. *Moore*, to hold the said messuage or tenement, hereditaments and premises, with the appurtenances thereto belonging, unto my said son, his heirs and assigns." Stopping here, and finding that the testator, whilst he was in possession of the house, and his son after him, had used the coal-cellar with it, there can be no doubt but that it was intended that the cellar should pass to the latter; and according to *Goodtitle v. Southern*, a defective description of occupation will not alter the devise. If, then, the cellar passed under the first clause in the will, is there any thing, in the second, to shew that what was given to the plaintiff, by the first, was meant to be taken away? The testator then goes on and devises as follows:—"also I give and devise unto my eldest daughter, *Ann Parker*, all that my freehold front messuage or tenement in *King Street*, in the said parish of the *Holy Trinity*, with the appurtenances thereto be-

longing, now in the occupation of —— *Edwards*, with a right of way and passage from time to time, and at all times, unto, out of, and from, the yard adjoining to the same, and the use of the pump and privy, being in the said yard, to hold the said messuage or tenement and hereditaments, with the appurtenances thereto belonging, unto my said daughter, for and during her natural life." It has long since been decided, and is now firmly established as a principle, that, if there be two clauses in a will wholly inconsistent with one another, the latter must in general prevail; but the Court, where they can, must so construe them as to make both available and reconcileable with each other, and we may do so here, if the words, "now in the occupation of *Edwards*," be any thing more than mere words of description, as, if they can be taken to shew that the testator intended to give all the house and premises, as he himself occupied them at the date of his will, and which his son occupied after him, the cellar would pass by the first clause; for if they be considered as words of quantity, the two clauses are clear and reconcileable, *viz.* to give the one house, as occupied by himself, to his son, and the other, as occupied by *Edwards*, to his daughter. But there are other words in the will, which shew that the testator did not consider he had given the whole of his front house to his daughter, but only that part of it which was occupied by *Edwards*: if he did, he would not have used the words "with a right of way and passage unto, and from the yard adjoining, and the use of the pump and privy therein, all of which would have passed by the larger words in the former part of that clause. The testator intended to give his son and daughter a comfortable enjoyment of both houses, *viz.* that the plaintiff should have his as he had been accustomed to occupy it, and that his daughter should have the other, with a right of way to the yard, and the use of the pump and privy. He therefore was fully aware of what he was doing; and, taking the

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whole of the will together, it is quite clear, that when he divided his property, he intended so to dispose of it as that the house in which his son lived should belong to him in the state he occupied it at the time the will was made; and if so, the coal-cellar passed with it; and, with the assistance of the evidence adduced at the trial as to the occupation by the testator, from the time of the purchase to that of making his will, and by his son afterwards, the latent ambiguity is explained; and there is consequently no reason to disturb the verdict, or send this cause down for a further inquiry.

Mr. Justice PARK was absent at Chambers.

Mr. Justice BURROUGH.—This case has been so fully gone into by my Lord Chief Justice, who has put the only true construction on the will, as connected with the evidence of occupation, that it is only necessary for me to add a few words: It was admitted at the trial, that the coal-cellar was within the boundary line of the defendant's house, and it might, at one time, have been occupied with it. There is, consequently, no reason to complain of a rejection of evidence on that point. At the time of making the will, the testator was seised in fee of both houses, one of which he had before occupied himself, and which was then in the occupation of his son; and he might dispose of both as he pleased. We can only look at the state of the property at the time of the devise, by which it was divided; and in the first clause, the house in which the plaintiff then lived was devised to him with the yard, premises, and appurtenances thereunto belonging, one part of which latter premises was in the occupation of the testator, and another part in the occupation of two other persons named in the will. The testator, therefore, intended to devise the whole house in the way in which it was then occupied. He lived on the spot, and described the occupation of both

houses; and the description of the second tenement is decisive to shew that he meant to confine it to the occupation of *Edwards*, as he enjoyed it at the time of making the will.

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Mr. Justice GASELEE.—I am of the same opinion. The case of *Doe d. Clements v. Collins* (*a*), appears to me to bear a strong resemblance to the present. There the testator being tenant for years of a house, garden, stables, and coal-pen, occupied by him, devised in the following words: “ I give the house I live in and garden to *H. C.*” without using the word appurtenances; and it was held that the stables and coal-pen passed without being expressly named, although the testator used them for purposes of trade, as well as for the convenience of his house, and Mr. Justice *Ashhurst* there said (*b*), “ the testator’s intention appears to have been, to give, by the bequest of his house, every thing which was in his occupation, as proper and convenient for the occupation of the house;” and although he expressed a difficulty as to the coal-pen, and doubted whether it would have passed by the bequest, if it had been proved to have ever been annexed to any other tenement; yet, he said, that as no proof of that sort was given, it must be taken for granted, that it never was annexed to any other tenement, and then a very slight degree of evidence was sufficient, for the purpose of shewing that it should pass with the house. Here, the testator used the cellar in question for his own purposes, during the time he occupied the plaintiff’s house, and the latter afterwards continued to occupy it in the same way. The testator, at the time of making his will, occupied another part of the same premises belonging to the house devised to the plaintiff; and, if so, the coal-cellars might be necessarily appurtenant to it. The testator was seised of both houses, and gave the one to his son, in the state in which he then occupied it, and the other

(*a*) 2 Term Rep. 498.

(*b*) Id. 502.

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to his daughter, as *Edwards* occupied it. Such occupation must be taken to refer to the time of making the will. And it appears to me, that no evidence offered on the part of the defendant was improperly rejected at the trial, as the plaintiff had previously proved the fact of occupation and enjoyment of the cellar in question, which was of itself sufficient to warrant the Jury in finding a verdict for him.

Rule discharged (a).

(a) See *Bodenham v. Pritchard*, 1 Barn. & Cres. 350; *Ongley v. Chambers*, 8 B. Moore, 665; S. C. 1 Bing. 483.

*Wednesday,*  
*Feb. 9th.*

The Court will not enlarge the time for bail to render their principal, on an affidavit that he was ill, and could not be removed without endangering his life.

#### WARRINGTON v. SAMMELL.

A RULE having, on a former day, been obtained by Mr. Serjeant *Adams*, calling on the plaintiff to shew cause why the time for the defendant's bail to render their principal might not be enlarged, on an affidavit stating that he, the defendant, was in an extreme state of illness, and that, if he were removed, his life would be endangered :—

Mr. Serjeant *Wilde*, now shewed cause, and relied on *Wynn v. Petty* (a), where the Court of *King's Bench* refused time to be enlarged for the bail to render their principal, on an affidavit that he could not be removed from the place where he was confined by illness, without endangering his life, which was precisely this case; and in *Grant v. Fagan*, Lord *Ellenborough* said (b), that as to the incapacity of bail to render their principal, arising without any default of their own, the same excuse might as truly be made in the case of the sickness of the princi-

(a) 4 East, 102.

(b) Id. 190.

pal, so as to make him incapable of removal, without endangering his life, where, nevertheless, the bail are answerable.

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**Lord Chief Justice BEST.**—These cases are expressly in point, to shew that we cannot accede to this application. We must adhere to established rules; the hardship of a particular case cannot justify us in departing from the usual practice; and where one party must suffer by the act of God, we cannot interfere.

The rest of the Court concurring—

Rule discharged (e).

(e) See *Cook v. Bell*, 13 East, 355.

—————  
TINGLE v. ROSTON.

Wednesday,  
Feb. 9th.

A RULE having been obtained by Mr. Serjeant *Wilde*, on a former day, to shew cause why a writ of *accedas ad curiam*, sued out, by the defendant, to remove a plaintiff from the Court of Requests for the manors of *Sheffield* and *Ecclesall*, into this Court, should not be set aside, on the ground, that the writ had been issued improperly.

A writ of *accedas ad curiam*, does not lie for the removal of a plaintiff from a court of competence to a superior Court, and if brought, the latter Court will set it aside on motion.

Mr. Serjeant *Peake*, now shewed cause, and submitted, that writs of this description had been frequently sued out, previously to the decision of this Court, in the late case of *Scott v. Bye* (a); and that the present writ had, in fact, been issued before that case was determined. In that case, too, the question turned on the jurisdiction of this Court, to set aside a writ of *false judgment*; and although Dr.

(a) 9 B. Moore, 649.

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*Gröenveld's* case was relied on, to shew that such a writ did not lie; *d fortiori*, the present writ is the proper mode of proceeding; and more particularly so, as the Court of Requests is not a Court of record.

Lord Chief Justice BEST.—Independently of the case of *Scott v. Bye*, this question has already been decided in the late case of *Bates v. Turner (a)*, where we expressly held, that a writ of *accedas ad curiam* will not lie for the removal of a plaint from a Court of Conscience to this Court. But as the present writ was sued out before the decision in *Scott v. Bye*, the rule must be made

(The rest of the Court concurring—)

Absolute; but without costs.

(a) *Ante*, 32.

Thursday,  
Feb. 10th.

### STORTON v. TOMLINS and Another.

The Court will not order an annuity deed, and other securities connected therewith, to be delivered up to be cancelled, although void under the statute 17 G. 3, c. 26, one of the grantees being an infant, and the memorial being defective; but will only set aside the warrant of attorney, and judgment entered up thereon.

A RULE nisi was obtained by Mr. Serjeant *Onslow*, on a former day in this Term, calling on the plaintiff to shew cause why the judgment which had been entered up on a warrant of attorney, for securing the payment of an annuity which had been granted by the defendants in this cause, should not be set aside, and the deed and other assurances delivered up to be cancelled, on the grounds, *first*, of the minority of one of the defendants at the time of granting the annuity; and *secondly*, that there were two grantees, although it appeared on the face of the memorial that there was one only; and consequently, that such memorial had not been properly enrolled, according to the statute 17 Geo. 3, it appearing that the an-

nuity had been granted previously to the passing of the 53 Geo. 3, c. 141.

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Mr. Serjeant *Wilde*, now shewed cause, and submitted, that although one of the grantors were an infant, it was no ground for avoiding the annuity, as against the other; and that, although there were two grantees, and the name of one only appeared on the face of the memorial, still the Court had no authority to order the deed and other securities to be cancelled; but that their jurisdiction must be confined to setting aside the warrant of attorney, and judgment, as those alone were under their control, and within their jurisdiction. In *Dalmer v. Barnard* (a), where a rule, similar to this, had been granted, it being stated, in the deed, that the consideration money was paid by the principal, when it appeared, that it had, in fact, been paid by an agent, on behalf of the principal; the Court made the rule absolute as far as respected the vacating of the warrant of attorney and judgment, but discharged it as to delivering up the deeds to be cancelled. So in *ex parte Chester* (b), where a bond and warrant of attorney to confess a judgment had been given to secure an annuity, and the date of the latter was not set forth in the memorial, the Court only set aside the warrant of attorney over which they had jurisdiction, as it was a proceeding in Court. In *The Duke of Bolton v. Williams*, Lord *Loughborough* said (c), "the Courts of common law, which will, upon their general jurisdiction, enter into the validity of the warrant of attorney or judgment, upon motion, in the particular application, under the statute 17 Geo. 3, will only set aside the judgment or execution, or vacate<sup>r</sup> the warrant of attorney; but their jurisdiction does not extend to ordering the bond to be deli-

(a) 7 Term Rep. 248.

(b) 4 Term Rep. 694.

(c) 2 Ves. Jun. 154; S. C. 4 Brown's Chan. Cas. 310.

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vered up; and, if ever done, it has been done inadvertently." That distinction was adverted to in a note to *Ex parte Ansell* (*a*); and in *Symonds v. Cobourne* (*b*), the Court refused to order an annuity bond to be delivered up to be cancelled, for want of a memorial, pursuant to the statute; and Lord Chief Justice *Eyre* there said, that the motion should have been, to stay proceedings.

Mr. Serjeant *Onslow*, in support of the rule, contend-ed, that all the securities, as well as the contract itself, were *ipso facto* void, as one of the grantors was an infant at the time the annuity was granted; and by the 17th Geo. 3, c. 26, s. 6, it is enacted, "that all contracts for the purchase of any annuity with any person being under the age of twenty-one, shall be and remain utterly void; any attempt to confirm the same, after such person shall have attained the age of twenty-one notwithstanding; and that any person procuring an infant to grant an annuity, or ratify it when of age, shall be guilty of a misdemeanor, and punished by fine or imprisonment." In *Blackstone's Commentaries* (*c*), where that learned Judge was treating of the act in question, it is said, "in case of collusive practices respecting the consideration, the Court, in which any action is brought, or judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated; and also all contracts for the purchase of annuities from infants, shall remain utterly void, and be incapable of confirmation, after such infants arrive to the age of maturity." And in *Williams v. Hookin* (*d*), the Court set aside a bond and other securities for an annuity, after a lapse of six years, for two of which it had been paid, on the ground that the considera-

(*a*) 1 Bos. & Pul. 66, n.

(*b*) Id. 482.

(*c*) Vol. 2, p. 461.

(*d*) 8 Taunt. 435.

tion money was not the property of *A.*, as stated in the securities, but of *B.*, and that the name of the person on whose behalf the money was paid, was not truly set forth in the receipt thereon; *B.* being alive, and having claimed the consideration money and the annuity as his own.

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**Lord Chief Justice Best.**—This is an application to set aside a warrant of attorney and judgment entered up thereon, and which warrant of attorney was given to secure the payment of an annuity granted by the defendants to the plaintiff; and that the deed and other securities might be delivered up to be cancelled, on the grounds that one of the grantors was an infant at the time the annuity was created, and that there had been no proper enrolment of the memorial. But we can only exercise a jurisdiction over the warrant of attorney and judgment, as we have no authority under the 4th section of the statute 17 Geo. 3, to order the deed and other securities to be cancelled, that section being confined to cases where part of the consideration should be returned to the person advancing it; or in case it should be paid in notes which should not be paid when due, or if the consideration should be paid in goods, or any part of it retained on pretence of answering the future payments of the annuity, or on any other pretence. It appears to me to be enough to say, that this is not one of those specified cases; and the sixth section only declares, that all contracts for the purchase of annuities with infants shall be void, and does not give us a jurisdiction to set aside the deed, bond, or other assurances, given to secure the annuity.

**Mr. Justice PARK,** and **Mr. Justice BURROUGH** concurred.

**Mr. Justice GASELEE.**—All the authorities shew that we have only a summary jurisdiction to set aside the warrant of attorney, and exercise a control over the judg-

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ment entered up thereon, as they are proceedings in Court, of which we can take notice on motion. In *Garrood v. Sanders* (a), where the grantor, having assigned a lease for securing the payment of an annuity, afterwards sold his interest in the lease to a *bond fide* purchaser, it was held, that he was not entitled to have the security delivered up to be cancelled, on the ground that the memorial, required by the 17 Geo. 3, had not been duly registered, as the Court said that the words of the 4th section of the act were expressly confined to cases where the application was made by the grantor himself. In *Hart v. Lovelace* an application was made to cancel an indenture, bond, and warrant of attorney, given to secure an annuity; and Lord *Kenyon* said (b), "he was not prepared to say whether or not all the instruments given to secure an annuity must be set aside, because one only was not properly registered, and that the cases on that subject were not reconcileable;" but that case was decided on another ground. In *Steadman v. Purchase* (c), an application was made to set aside the judgment and annuity deeds, because the indorsement on the indenture by which the annuity was granted, was not registered as well as the deed itself; and the Court made that part of the rule, to set aside the judgment, absolute, but discharged that part of it which had reference to setting aside the deeds, as they had only a summary jurisdiction over the judgment, by reason of the warrant of attorney. Although, in *ex parte Ansell*, this Court made a rule absolute, to cancel the bond, warrant of attorney and deed, on the ground that the memorial did not state the terms and conditions of redemption contained in a proviso in the deed; yet the learned reporters, in a note subjoined to that case, after referring to *ex parte Chester*, and the *dictum* of Lord *Loughborough*, in the Duke of *Bolton v. Williams*, doubted whether the rule in

(a) 6 Term Rep. 403.

(b) Id. 476.

(c) Id. 737.

*ex parte Ansell* was not made absolute in the form in which it was moved, through *inadvertence*; and in *Symonds v. Cobourne*, the Court acted accordingly, and refused to order an annuity-bond to be delivered up to be cancelled, for want of a memorial pursuant to the statute 17 Geo. 3, although it was void by the 1st section of the act. The Court of *Exchequer* have proceeded on the same principle; and in *Appleby v. Smith* (a), and *Jeffrey v. The Duchess of Athol* (b), refused, on motion, to order the securities to be delivered up, for an omission or informality in the memorial, but confined themselves to setting aside the warrant of attorney and judgment; it being admitted, in the one case, that they only could be reached by motion;—and in the latter the Court held that they had no authority to direct the securities to be delivered up, the cases in which such jurisdiction is given by the 4th section being specifically defined. On authority, therefore, as well as on principle, the rule for setting aside the warrant of attorney, and judgment entered up thereon, in this case, must be made absolute; and that part of it requiring the cancelling the deed and other securities, discharged (c).

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Rule accordingly.

(a) 3 Anst. 865.

3 East, 500. *Brown v. Rose*, 1

(b) Id. n.

Marsh. 478.

(c) See *Chawner v. Whaley*,

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PRYCE and Another *v. WILKINSON.*

*Thursday,*  
*Feb. 10th.*

THIS was an action of *assumpsit*.—The first count of the declaration stated, that the defendant was indebted to the plaintiffs in 1000*l.*, for the work and labour, care, dili-

The plaintiffs having been employed by the defendant to sell an estate for him, and being

unable to do so, they applied to an attorney, who raised a sum by way of mortgage, but they did not interfere in the negotiation:—Held, that as they had assisted in procuring the loan, they were drivers of a bargain, within the statute 12 Anne, stat. 2, c. 16, s. 2, and, therefore, only entitled to 5*s. per cent.* commission.

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gente, journies and attendances of the plaintiffs, by them done, performed and bestowed, as the agents of the defendant, and on his retainer; and for certain commission and reward due and payable from the defendant to the plaintiffs, in respect thereof. To this were added a *quantum meruit*, and the usual money counts. The defendant suffered judgment by default. A writ of inquiry of damages was executed before the Secondary, in *Coleman Street, London*, on the 13th December last, when it appeared that the plaintiffs, accountants in the city, sought to recover 105*l.*, being a commission of  $2\frac{1}{4}$  per cent. for procuring for the defendant a loan of 4200*l.*, on the mortgage of an advowson in *Essex*, of which he was the incumbent. That the defendant being desirous of disposing of the advowson, subject to his own incumbency, had employed the plaintiffs to sell it for him; that they, not having succeeded in the attempt, represented to the defendant, that they could procure him the money he wanted, upon mortgage; and that, with his consent, they negotiated with several solicitors for that purpose, and eventually a loan of 4200*l.* was procured by a solicitor employed by the plaintiffs, but without any further interference on their parts.

The plaintiffs, in support of their claim for commission, produced, before the Secondary, several letters written by the defendant to them, containing a correspondence from *August, 1823*, to *January, 1824*, and in one of which the defendant stated, that he certainly would not object to the plaintiff's terms of  $2\frac{1}{4}$  per cent., if they would finish the business speedily.

It was objected, for the defendant, that this demand of  $2\frac{1}{4}$  per cent. was illegal, under the statutes of usury, 12 *Car.* 2, c. 13, s. 8, and 12 *Anne*, stat. 2, c. 16, s. 2(a), which limit the commissions upon the procurement of loans to 5*s.* per cent.

(a) By 12 *Anne*, stat. 2, c. 16, s. 2, confirming 12 *Car.* 2, c. 13, s. 3, it is enacted, "that all and eve-

ry scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains

The Secondary was of opinion, that the plaintiffs were barred by those statutes from recovering more than 5*s. per cent.*; and, in his charge to the Jury, he told them, that if they considered the work and labour, proved by the plaintiffs, entitled them to ten guineas, which was the extent they could recover, being 5*s. per cent.* on 420*0l.*, they must give a verdict for that sum; and, if not, then for any less sum which they might think proper. The Jury accordingly returned a verdict for the plaintiffs for 10*l. 10s.*

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Mr. Serjeant *Wilde*, on a former day in this Term, on affidavits of the plaintiffs, stating these facts, obtained a rule nisi that this inquisition might be set aside, and a new writ of inquiry executed, on the ground of a misdirection to the Jury by the Secondary. He submitted that the plaintiffs did not fall within the operation of the statutes, as they did not advance the money themselves; and that, at all events, they were entitled to a remuneration for endeavouring to dispose of the advowson in the first instance; and if they had been obliged to take journeys, and incur expenses, in examining the property and making other inquiries, they were clearly entitled to a larger commission than 5*s. per cent.*

Mr. Serjeant *Bosanquet* now shewed cause, and relying on the statute 12 *Anne*, stat. 2, c. 16, submitted, that, un-

for contracts, who shall, after the 29th September, 1714, take or receive, directly or indirectly, any sum or sums of money, or other reward or thing, for brokerage, soliciting, driving or procuring the loan or forbearing of any sum or sums of money, over and above the rate or value of *five shillings* for the loan or forbearing of 100*l.*

for a year, and so rateably, or above twelve pence over and above the stamp duties, for making or renewing of the bond or bill for loan, or forbearing thereof, or for any counter-bond or bill concerning the same, shall forfeit for every such offence 20*l.*, with costs of suit, and suffer imprisonment for half a year."

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der the circumstances, the plaintiffs must be considered as having procured the loan in the character of brokers, so as to bring them within the meaning of the second section of that act; and although they did not interfere after the loan was negotiated for, yet they were the means of its being ultimately procured; and any party who is instrumental to the procurement of money, by way of loan, falls expressly within the spirit and operation of the statute; and here it is quite clear, that the plaintiffs forwarded the transaction.

Mr. Serjeant *Wilde*, in support of the rule, insisted, that the plaintiffs did not of themselves procure the money, nor did they do any thing to bring themselves within the contemplation of the Legislature, at the time the statute was passed; and that they did not fall within either of the classes, or description of persons mentioned in the act, *viz.* brokers, solicitors, or drivers of bargains. That at the express request of the defendant, they sought for persons who were likely to treat for the loan required; that they were therefore mere general agents, and had nothing whatever to do with preparing the securities by which the loan was to be negotiated or effected. And although a solicitor, or driver of bargains might be within the act, it could not apply to the plaintiffs, who were entitled to a remuneration for their trouble, and for the expenses incurred by them in endeavouring to effect the sale in the first instance, and, on their failing to do so, in introducing the defendant to the solicitor of the party by whom the money was eventually advanced. Such solicitor was the party whom the Legislature meant to confine in his charge for brokerage; and here, as it appeared by the correspondence between the parties, that the plaintiffs were employed in endeavouring to effect a sale or mortgage of the defendant's property, for nearly six months before the ultimate arrangement was made, they were entitled to recover on the count founded on a *quantum meruit*.

**Lord Chief Justice Best.**—The plaintiffs in this action were originally applied to by the defendant to procure the sale of his advowson, of which he was the then incumbent. The sale could not be accomplished, but the plaintiffs endeavoured to procure a loan, and accordingly applied to a solicitor for that purpose, through whom the negotiation was ultimately effected, and for this the plaintiffs sought to recover from the defendant a commission of  $2\frac{1}{2}$  per cent. It is clear, therefore, that they assisted in procuring the advance to be made. The question then is, whether for this service they can charge a commission of  $2\frac{1}{2}$  per cent., or must be confined to 5s. only. It is not necessary to decide whether they have been guilty of an offence, for which they are liable to punishment; it is enough if the transaction in which they have been engaged fall within the meaning of the Legislature and terms of the statute of *Anne*, at the time it was passed. It is quite clear that it is against the policy of the act, the object of which was not only to reduce the rate of interest, but to protect persons in distress, who might require the assistance of scriveners, brokers, or others, and provide against the extortionate exactions to which they might be otherwise exposed. The 1st section regulates the rate of interest to be taken on loans, *viz.* 5*l. per cent. per annum*, and the 2nd applies to scriveners, brokers, solicitors, and drivers of bargains for contracts. The plaintiffs certainly fall within the latter description of persons; and although they did not drive the nail to the head, yet they not only rendered their assistance in finding out a person who would drive the bargain, but afterwards allowed it to be driven; and if persons assist in driving they must be considered as drivers. The statute then provides, that if such persons shall take or receive, directly or indirectly, any sum or reward for brokerage, soliciting, driving or procuring the loan or forbearing of any sum over and above the rate or value of 5s. for the loan or forbearing of 100*l.* for a year,

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and so rateably, they shall forfeit for every such offence 20*l.*, and suffer imprisonment for half a year. The plaintiffs have not only solicited, but been the actual means of procuring the loan in question; and if they had negotiated it altogether, they could only have been entitled to charge at the rate of 5*s. per cent.*; and, as they performed part only, it would be absurd to say, that they should be entitled to charge more than if they had done the whole. It is of the greatest importance, that persons standing in the situation of the defendant, should be protected against improvident bargains, which they might be induced to make in time of need or necessity; and monies ought not to be allowed to be taken from them, which in justice belong to their creditors. Parties who are engaged in transactions of this nature, are not only liable to lose any charges that might be agreed to be paid them by way of compensation or commission, but they may also be called on to suffer the penalties imposed by the statute. As, therefore, it appears to me, that if the plaintiffs had negotiated the whole of the loan, from beginning to end, they could only be entitled to charge the defendant at the rate of 5*s. per cent.*, I think the view the Secondary took was correct, and that this rule must, consequently, be discharged.

Mr. Justice PARK.—It is of the greatest importance that this statute should receive the construction put on it by my Lord Chief Justice; and if the argument for the plaintiffs could prevail, the operation of the statute would be altogether perverted; as, before a transaction of this nature were completed, a party who might endeavour to procure a loan by way of annuity, at an exorbitant rate, might stop short just before the completion of the transaction: and here it appears by the affidavits, that the plaintiffs entered into the negotiation for the loan, and that they anticipated its completion, as the defendant stated in one of his letters that he would not object to their terms of 2*s. per cent.*, if they would finish the business speedily.

**Mr. Justice BURROUGH.**—If the plaintiffs had actually contracted with the defendant at the rate of  $2\frac{1}{2}$  per cent., by way of commission, they could not have been entitled to recover it, as the transaction falls within the meaning and operation of the statute; and I very much doubt whether they were entitled to recover any thing. If they took  $2\frac{1}{2}$  per cent. they would have been guilty of a misdemeanor, and if so, they could only be entitled to nominal damages.

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**Mr. Justice GASELEE.**—If there had been any evidence of a specific contract for sale, and the plaintiffs were put to expense in endeavouring to effect it, but could not succeed, they might have been entitled to recover, on the counts for work and labour; but they sought to recover from the defendant a certain commission for negotiating for a loan, which falls within the meaning of the statute.

Rule discharged, with costs.

### IN THE EXCHEQUER CHAMBER..

#### WHITEHEAD v. GREENHAM.

[In Error.]

*Thursday,  
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THIS was a writ of error from the Court of King's Bench, on a judgment after verdict, in an action of *assump-*

*tion*, had retained him to lay out £100. in the purchase of an annuity; that the defendant promised to use due care to lay out the money in such purchase, the payment whereof should be well and sufficiently secured; that the plaintiff, confiding in the defendant's promise, delivered the money to him for that purpose, but that he advanced it on a bad and insufficient security:—Held, that, after verdict, it must be taken that the promise was made in consideration of the delivery of the money, which was a sufficient consideration; and that, even if such consideration were insufficiently stated, no objection could be raised to it, either in arrest of judgment, or by writ of error.

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*sit*, against the defendant below, for not securely investing a sum of money entrusted and delivered to him by the plaintiff below, according to his undertaking.

The declaration contained several counts; and, at the trial, a verdict was entered for the plaintiff, upon the five first counts, generally. The third count stated, "that whereas, before the making of the promise and undertaking of the defendant below, thereafter mentioned, to wit, on, &c., at, &c., the plaintiff below, at the special instance and request of the defendant below, retained and employed the defendant below to advance and lay out a certain sum of money, to wit, the sum of 700*l.* for the plaintiff below, in the purchase of an annuity, to be well and sufficiently secured, he, the defendant below, undertook, and then and there faithfully promised the plaintiff below to use due and sufficient care to advance and lay out the said sum of money in the purchase of an annuity, the payment whereof should be well and sufficiently secured." The plaintiff below then averred, "that he, confiding in the said last-mentioned promise and undertaking of the defendant below, afterwards, to wit, on, &c., at, &c., delivered to him, the defendant below, the said last-mentioned sum of money, for the purpose last aforesaid; and that although the defendant below, afterwards, to wit, on, &c., at, &c., did advance and lay out the said sum of money for the plaintiff below, in the purchase of a certain annuity, to wit, the purchase from the Reverend *Samuel Locke*, of an annuity or annual payment of 96*l.*, during the life of the said *Samuel Locke*, for, and in consideration of, the said sum of 700*l.*, the money of the plaintiff below, then and there advanced, and paid by the defendant below to the said *Samuel Locke*; nevertheless, that the defendant below, not regarding his said promise and undertaking, but contriving, and fraudulently intending, craftily and subtilely, to deceive, defraud, and injure the plaintiff below, in this behalf, did not, nor would, use due and

sufficient care to advance and lay out the said sum of money in the purchase of an annuity, to be well and sufficiently secured, but wholly neglected so to do, and thereby craftily and subtilely deceived and defrauded the plaintiff below, in this, to wit, that the defendant below, then and there wrongfully and unjustly advanced and paid the said sum of 700*l.* to the said *Samuel Locke*, as aforesaid, on a bad, insufficient, and inadequate security; and also, in this, to wit, that the said *Samuel Locke*, before and at the time of the said advance of the said sum of 700*l.* to him as aforesaid, and from thence hitherto, had been, and then was, in bad and insolvent circumstances, and wholly unable to pay the said annuity, or any part thereof; and by reason of the badness and insufficiency of the said security, and of the said last-mentioned bad and insolvent circumstances of the said *Samuel Locke*, he, the plaintiff below, had been, and was wholly unable to recover or receive payment or satisfaction of the said annuity, and was likely to lose the same, as well as the said sum of 700*l.* so advanced and paid to the said *Samuel Locke* as aforesaid; and also thereby, he the plaintiff below, had lost and been deprived of the use and benefit of divers sums of money, amounting, in the whole, to a large sum of money, to wit, the sum of 200*l.*, paid by the plaintiff below, in and about the effecting and keeping on foot a certain policy of insurance, effected on the life of the said *Samuel Locke*, to wit, at, &c., aforesaid."

The error assigned (among others) was, that a general verdict had been found and entered for the plaintiff below, with general damages on the first five counts of the declaration, whereas the third, (as above set out), was defective, in not alleging any, or a sufficient, consideration for the promise and undertaking of the defendant below, as therein set forth. The case now came on for argument, when

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Mr. *Tisdal*, for the plaintiff in error (defendant below), submitted, that there was no consideration for the promise alleged on the face of the third count; as it is merely stated that the plaintiff below, at the request of the defendant below, retained and employed the latter to lay out and advance a certain sum of money in the purchase of an annuity; but there is nothing to shew that the defendant's promise was made in consideration of such retainer or employment. In *Comyns's Digest* (a), it is laid down, "that an *assumpsit* does not lie without a consideration, as if a man, without more, promise to build an house for another; for that is *nudum pactum*." Although cases may be found where a consideration may be implied, as in *Remington v. Taylor* (b); where, on an exception being taken, that there was no consideration alleged for the defendant's promise, it was answered, that there was a consideration apparent of itself, the contract being for goods bargained and sold. Here, however, the retainer was wholly distinct from the subsequent promise, which does not appear to have been made on such retainer, or for any specific employment.

[Lord Chief Justice *Best*. — Although the allegation for the promise is not laid in apt words, should not the objection have been raised on demurrer?]

[Mr. Baron *Hullock*. — It must be presumed, after verdict, that every thing necessary to sustain the action was proved at the trial; and evidence must have been adduced to shew, that the plaintiff entrusted the defendant with £100. to lay out in the purchase of an annuity, and that of itself implies a sufficient consideration.]

The allegation is, that the defendant promised to use due and sufficient care to advance and lay out the money in the purchase of an annuity, the payment whereof

(a) Tit. "Action upon the Case upon *Assumpsit*," F. 5.

(b) 1 Lutw. 237.

should be well and sufficiently secured; but it does not appear that the defendant acted in any character which imposed such a duty upon him; nor can a presumption be raised, that he was bound to investigate the securities; which might have been the case, had he been an attorney; nor is it averred that he was to receive any reward or benefit for the performance of such duty. In *Bourne v. Diggles* (*a*), which was an action against an attorney for non-feasance, in not looking sufficiently into a title, it was held sufficient to state that he was retained as an attorney, without stating the consideration; and on *Ekes v. Gataward* (*b*), being cited, Lord *Ellenborough* inquired if it were not stated that the defendant was employed as an attorney, and on its being answered that he was alleged to be retained, &c., but not as an attorney, his Lordship said, that that must mean that he was retained as an attorney, and that the Court would take judicial notice that he would not act without reward. That the very retainer was an employment, and could not be said to be without a consideration. Here, however, there is no allegation that the defendant was an attorney, or that he was retained or entitled to any reward. There is consequently no apparent consideration for the defendant's promise on the face of the count; and even if there had been, it is not sufficiently stated. The judgment, therefore cannot be supported, as, if one of several counts, on which judgment has been entered up on a verdict for general damages, be defective in substance, it is a sufficient ground to reverse such judgment.

**Mr. Chitty, contra.**—The count in question is good, or, at all events, may be supported after verdict. But there was a sufficient consideration stated on the face of it, and if it were not formally stated, or even not at all, it is cured

(*a*) 2 Chit. Rep. 311.

(*b*) 5 Term Rep. 143.

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by verdict. The count in substance states, first, the retainer and employment of the defendant by the plaintiff, on a certain day, to lay out a specific sum for him in the purchase of an annuity, to be well and sufficiently secured. That constitutes the consideration. Then follows a promise by the defendant to use due and sufficient care to lay out the *said* sum in the purchase of an annuity. The promise therefore is founded on the previous retainer: and lastly, the plaintiff avers, that he, confiding in such promise, delivered the money to the defendant *for the purpose aforesaid*; but that he advanced it on an insufficient and inadequate security. The subject matter for the consideration is not only apparent, but sufficient, and any damage, or any suspension or forbearance of a right, or any possibility of a loss, occasioned to a plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrue to the party undertaking. In *Sturlyn v. Albany* (*a*), which was an action of *assumpsit* for rent in arrear, on a lease to *J. S.*, who granted all his estate to the defendant, and, on its being demanded, the defendant promised the plaintiff, that if he could shew him a deed that the rent was due, he would pay him the rent and arrears, and the plaintiff shewed him an indenture of lease; it was moved in arrest of judgment, that the shewing of the deed was no consideration; but it was adjudged for the plaintiff, the Court saying, "when a thing is to be done by the plaintiff, be it ever so small, it is a sufficient consideration to ground an action." So in *March v. Culpepper* (*b*), in *assumpsit* against an administratrix, on a promise to pay a debt of her intestate, for goods had of the plaintiff, in consideration he would let two persons survey the account was held to be a good consideration. In *Pullen v. Stokes* (*c*), where *A.* having re-

(*a*) Cro. Eliz. 67.

(*b*) Cro. Car. 70.

(*c*) 2 H. Bl. 312.

covered judgment against *B.*, and a *fieri facias* being delivered to the sheriff, in consideration that *A.*, at the special instance of *C.*, had requested the sheriff not to execute the writ, *C.* promised to pay *A.* the debt and costs, together with the sheriff's poundage, &c.; on a judgment by default, and error brought, the promise was held to be binding on *C.*, although it was not averred that the sheriff did in fact desist from the execution, as it was sufficient to state the request to forbear, if the contrary did not appear. In *Williamson v. Clements* (*a*), it was held, that any act which is a detriment to the plaintiff, is a sufficient consideration for a promise to pay money, and, therefore, that an averment that the defendant was indebted, on a bill of exchange, and that the plaintiff having lost the bill, had, at his request, given him a bond acknowledging payment, and conditioned to indemnify him against the bill, stated a good consideration for a promise by the defendant to pay the contents of the bill, as it was a disadvantage to the plaintiff to execute the bond, if it were of no advantage to the defendant. In *Coggs v. Bernard* (*b*), it was held, that if a man act by commission for another gratuitously, an obligation is thereby imposed on him to perform the trust, and the breach of it is a good ground of action: and Lord Chief Justice *Holt* there said (*c*), "it is objected, that there is no consideration to ground the defendant's promise upon; and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management; and if a man will take a trust upon himself, and miscarry in the performance of it, an action will lie against him for that, though nobody could have compelled him to do the thing. A bare being entrusted with another man's goods, must be

(*a*) 1 *Taunt.* 523.(*b*) 2 *Lord Raym.* 909.(*c*) *Id.* 919.

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taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession." The same principle was laid down in *Else v. Garswood* (a), where a count stating that the plaintiff being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials; but that the defendant, instead of using those, made use of new ones, thereby increasing the expense, was held good; and the Court there drew a distinction between non-feasance and misfeasance: and in *Shells v. Blackburne*, they distinguished between a gratuitous and general bailee; and Lord *Loughborough* there said (b), "I agree with Sir *William Jones*, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertake to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence;" and in *Hutton v. Osborne* (c), where the plaintiff declared that the defendant had undertaken to carry a hare for the plaintiff, but lost it, and it was objected, on demurrer, that the plaintiff had not declared on the custom of the realm, and therefore that the defendant must be considered as a private person, and, so, that there was not any consideration laid, and that the promise was a mere *nudum pactum*; yet Mr Justice *Probyn*, and Mr. Justice *Reynolds* admitted that the defendant must be taken to be a private person; but said, that it was determined in *Coggs v. Bernard* that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration; and that, if a private person voluntarily under-

(a) 8 Term Rep. 143.

(b) 1 H. Bl. 162.

(c) 1 Selw. Ni. Pri. 3d Edit. 362, n.

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took the carriage of goods, he was, by law, answerable for damage arising from his negligence: and here it is averred that the plaintiff delivered money to the defendant, for the purpose of being laid out in the purchase of an annuity, and he of course expected, that it would be sufficiently secured. *Secondly*, although the words “*in consideration thereof*,” are omitted in the count, it is immaterial, after verdict. In *Starke v. Cheeseman* (*a*), which was an action on a bill of exchange, protested for nonpayment, it was objected on a motion in arrest of judgment, that the plaintiff had not laid in the declaration, that the defendant promised to pay the money after the protest made; but the Court said, that the law raised the promise, and therefore that it was not necessary to lay an actual promise. In *Jones v. Ashburnham* (*b*), Mr. Justice Grose said, “there is a great difference between questions of this sort arising upon demurrer to the declaration, and in arrest of judgment after verdict; in which latter case, every thing is to be intended, which can be in favour of the verdict.” In *Marshall v. Birkenhead* (*c*), where a mere forbearance of a debt was stated as the consideration of a promise, although it was not expressly averred in the declaration to whom the forbearance was given, the Court held it to be sufficient after verdict. So in *Hume v. Hinton* (*d*), a promise by the mother of an intestate, indebted to the plaintiff, that if he would stay for the money, till a given day, she would pay it, was held sufficient to sustain the declaration after verdict. In a note by Mr. Serjeant Williams, to *Stennell v. Hogg* (*e*), the authorities are collected, and principles laid down, as to what defects are aided after verdict; and in *Nerot v. Wallace*, Mr. Justice Buller said (*f*), “after verdict, every thing shall be intended which

(*a*) Carth. 509.

(*d*) Styles, 304.

(*b*) 4 East, 465.

(*e*) 1 Wms. Saund. 228, n. 1.

(*c*) 1 New Rep. 172.

(*f*) 3 Term Rep. 25.

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the allegations of the record require to be proved;" and *Richardson v. Mellish* (a), is an authority to shew, that if there be sufficient on the face of a declaration to raise a presumption of consideration, it is sufficient, after verdict; and, here, it must be intended that every thing essential to the cause of action was proved at the trial; and the Jury have found, in effect, that the defendant prevailed on the plaintiff to entrust him with a certain sum, in consequence of a promise made by him, that he would take due and sufficient care, in laying it out in the purchase of an annuity, but which he failed to do. On these grounds, the judgment found for the plaintiff below must stand, and the count in question is sufficient to support it.

Mr. *Tindal*, in reply.—The cases cited do not apply to the present, as here the objection is, that there is no allegation of a consideration for the promise, or, at all events, that it is not sufficiently stated. In the first class of cases, there was some consideration stated, by which it was shewn either that it was beneficial to the defendant, or detrimentsl to the plaintiff. The second class, beginning with *Coggs v. Bernard*; were actions on the case, in which it was not necessary to shew a consideration on the face of the record; but that if a party accepted a retainer and acted on it, it was sufficient, although he acted gratuitously. With respect to the last class of cases, in *assumpsit*, in which the verdict has been held to cure defective allegations of consideration, such verdict cannot supply the want of an essential averment, or material allegation; and here the plaintiff below, in order to establish the count in question, should have averred, that the promise of the defendant below was made in consideration of the retainer, on which the plaintiff below entrusted him with his money to lay out by way of annuity.

(a) 9 B. Moore, 435.

Lord Chief Justice BEST, delivered the judgment of the Court as follows.— This is a writ of error, from the Court of *King's Bench*. No objection was raised or argued there, but the question now is, whether the third count of the declaration be sufficient to sustain the judgment which has been entered on the verdict found, for the plaintiff below. We are of opinion that it is. Two objections have been raised to this count, *first*, that there is no consideration apparent on the face of it, to support the defendant's promise: and *secondly*, that even if there were, it is insufficiently stated. With respect to the latter objection, it cannot be taken in this stage of the cause. An imperfect statement of the consideration, might, and should have been taken advantage of by demurrer, but not in arrest of judgment, and still less by a writ of error. Is there, then, any consideration for the defendant's promise, apparent on the face of the count? It states, that the plaintiff, at the request of the defendant, had retained and employed the latter to lay out a certain sum of money, to wit, the sum of 700*l.*, for the plaintiff, in the purchase of an annuity; that the defendant undertook, and faithfully promised the plaintiff to use due and sufficient care, to advance and lay out that sum in the purchase of an annuity, the payment whereof should be well and sufficiently secured. The plaintiff then averred, that he, confiding in such promise, delivered the said sum of 700*l.* to the defendant for that purpose. The case of *Coggs v. Bernard*, and others subsequent to it, are decisive to shew that the mere delivery of an article is a sufficient consideration. In that case the consideration was the delivery of brandy. Here it is the delivery of 700*l.*, which it was the duty of the defendant to account for. But it has been said, that it does not appear, that the delivery was the consideration for the defendant's promise. The money, however, was delivered by the plaintiff to the defendant; and if there be an actual delivery, it is sufficient in law to raise a responsibility, in

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the party who receives it, for its due application. It has been also said, that it was material for the plaintiff to aver that the promise was made in consideration of the retainer; but when the Jury have found that the sum of 700*l.* was delivered by the plaintiff to the defendant, and that the latter promised to advance and lay it out in the purchase of an annuity, it must be inferred, after verdict, that the promise was made in consideration of the delivery of the money, by the plaintiff. In all cases, after verdict, we are to look and ascertain what the Judge would require to have been proved at *Nisi Pruis.* Now, there can be no doubt but that the Judge who tried this cause, required proof of the delivery of the 700*l.* by the plaintiff to the defendant, and that, in consequence of such delivery, the latter expressly promised to lay it out, so that it should be well and properly secured. There can be no doubt but that such proof would be sufficient, to constitute a good cause of action; and as that proof was necessary in order to sustain this count, we must now presume that it was given, and we are, therefore, unanimously of opinion that the judgment must be

Affirmed.

### IN THE EXCHEQUER CHAMBER.

*Thursday,  
Feb. 10th.*

**RUSTON v. OWSTON.**

[In Error.]

THIS was a writ of error, from the Court of *King's Bench*, on a judgment by default, in an action of *assumpsit*. The declaration was entitled generally, of *Michaelmas Term, 4 Geo. 4;* and the first count stated, that the cause of action be therein alleged to have accrued on the 18th November, as the whole Term is in law considered as one day, and the declaration might have been delivered at any time within the Term.

defendant below, heretofore, to wit, on the 18th day of *November*, 1823, was indebted to the plaintiff below in the sum of 150*l.*, for goods, before that time, by the plaintiff below, sold and delivered to the defendant below; and that being so indebted, the defendant below, in consideration thereof, afterwards, to wit, on the day and year aforesaid, undertook and promised the plaintiff below, to pay him the said sum of 150*l.*, when he, the defendant below, should be thereto afterwards requested. Then followed a count founded on a *quantum valebat*, and the usual money counts; in all of which the cause of action was stated to have accrued on the 18th *November*, and the promises were laid on that day. The error assigned was, that, by the memorandum, the declaration related to the first day of *Michaelmas Term*, 1823, *viz.* *November* 6th, whereas all the causes of action were stated to have accrued on the 18th *November*, 1823; so that, on the face of the proceedings, the declaration appeared to have been delivered before the causes of action therein set out accrued. The cause now came on for argument, when—

Mr. D. F. Jones, for the plaintiff in error, submitted, that it was a general rule of pleading, that, if a declaration be entitled generally of a Term, it has relation to the first day of the Term of which it is so entitled. It is true, that if the objection now raised had been taken on demurrer, it could not have availed; and the only question is, whether it be good ground of error. In *Pugh v. Robinson* (a), where the cause of action was stated to have accrued on the first day of Term, the Court of *King's Bench*; on demurrer, held, that the declaration might be entitled of the Term generally, as the delivery of the declaration is the act of the party; and in ancient times it could not have been delivered till the sitting of the

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(a) 1 Term Rep. 116.

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Court, so that the cause of action might well have accrued before the actual delivery of the declaration. In *Dickinson v. Plaisted* (*a*), the plaintiff filed his bill in *Trinity* vacation, with a general memorandum of the preceding *Trinity* Term; the cause of action was a promissory note, which became due on the 5th *September*; and the Court gave leave to amend the record, by inserting a special memorandum of the day on which the plaintiff's bill was filed, after error brought. But the necessity of the amendment shews that the general memorandum was wrong, and that the objection to it was good, on error. In *Randole v. Bailey* (*b*), the clerk of the errors in this Court, in transcribing the record, by mistake, instead of entitling the declaration specially, entitled it generally; and error was assigned thereon; after which he altered the transcript, by inserting the special memorandum: the Court considering that the clerk of the errors was the agent of the plaintiff in error, refused to restore the transcript to the state in which it stood at the time the error was assigned. There the mistake was considered as the mistake of the plaintiff himself, and there can be no doubt but that it was a good ground of error.

[Mr. Baron *Hullock*.—In *Ward v. Gansell* (*c*), it was held, that a declaration relates back to the first day of the Term, unless there be any circumstance on record, to refer it to any subsequent return, and then that it would only relate back to the essoign day of the last preceding return; here, it appears on the record, that the causes of action accrued on the 18th *November*, which is a day within the Term, therefore, the declaration is properly entitled, as it might have been delivered at any time before the end of the Term].

In *Venables v. Daffe* (*d*), which was an action by bill, for maliciously indicting the plaintiff, the bill and decla-

(*a*) 7 Term. Rep. 474.

(*c*) 2 Sir W. Bl. 735.

(*b*) 1 Mau. & Selw. 232.

(*d*) Carth. 113.

ration were held to be bad, after verdict, and the judgment was arrested, because the day mentioned in the declaration, as being the day on which the plaintiff was acquitted on the indictment, was after the beginning of the Term, of which the bill and declaration were entitled generally; and although it was insisted that the error was cured by verdict, the Court held otherwise, because it appeared, that the plaintiff had no cause of action on the first day of the Term, to which day the declaration must necessarily relate, for the Term is, in law, but as one day. In a note by Mr. Serjeant *Williams* to *Mellor v. Walker* (*a*), the rule as to entitling declarations, generally or specially, is fully laid down, and all the authorities collected. Although in *Bishop v. Kaye* (*b*), it was held to be no ground of error, in a judgment of an inferior court, that the plaint was levied before the cause of action accrued, as the objection was cured by verdict; yet that will not apply to this case, as the defendant below suffered judgment to go by default. Although, therefore, this objection might not avail on demurrer, or after verdict, yet it is a good ground of error, where a party has suffered judgment by default.

Mr. *Tindal, contra*, was stopped by the Court:—

Lord Chief Justice *BEST*.—I should be exceedingly sorry, if the Court were obliged to yield to an objection of this description, which is contrary to justice and common sense. The declaration is entitled of *Michaelmas* Term, generally, which begins on the 6th *November*; and unless it appeared on the record, that it was delivered after that day, the objection would have been good. But there is something on the face of the declaration, from which we can collect, that it was delivered after the 6th;

(*a*) 2 Wms. Saund. I, n. (1).

(*b*) 3 Barn. & Ald. 606.

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because the causes of action are stated to have accrued on the 18th *November*, which is a day within the Term, and we can take judicial notice of that fact. The whole Term is considered as one day; and confining ourselves to the four corners of the record, we can ascertain that the declaration was delivered after the cause of action accrued.

Judgment affirmed.

*Mr. Carter* was instructed to raise a similar objection in the case of *Scott v. Williamson*, but admitted that he was unable to support it.

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#### YOUNG v. GYE and Another.

An arbitrator, to whom all matters in difference between the plaintiff and defendants were referred, having directed a verdict to be entered for the plaintiff, in an action of trespass, brought by him against the defendants, with 40*s.* damages, and found that 10*l.* was due from the former to the latter, for goods sold, which sum he directed the plaintiff to pay the defendants, within two

months next after the date of the award; and the plaintiff's costs of his action were taxed at 10*l.* : —Held, that the defendants could not set off the sum directed to be paid to them by the plaintiff, against such taxed costs, the time allowed for the payment of such sum not having expired when the application was made.

ing to have issued irregularly, it was accordingly done. The plaintiff, on the 30th June, 1824, commenced an action of trespass against the defendants, for taking his goods, which, on coming on for trial at the Sittings after the last Term, was referred, together with all matters in difference between the parties, to an arbitrator, who, on the 21st January last, awarded that a verdict, in the action of trespass, should be entered for the plaintiff, with 40*s.* damages; and also that 10*l.* were due and owing from the plaintiff to the defendants, for goods sold and delivered by them to him, which sum he ordered the plaintiff to pay to the defendants within two calendar months next after the date of the award. Judgment having been entered up on the verdict, the plaintiff's costs were, on the 31st January, taxed by the Prothonotary, which, together with the damages, amounted to 10*l.*

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Mr. Serjeant *Wilde*, having, on a former day in this Term, on an affidavit stating the above facts, obtained a rule, calling on the plaintiff to shew cause, why the costs in this action, as taxed by the Prothonotary, should not be set off against the sum of 10*l.* directed by the arbitrator to be paid by the plaintiff to the defendants, or why the plaintiff might not be restrained from suing out execution for such costs:—

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Lawes*, now shewed cause, and contended, that there were no mutual debts between the parties, so as to allow the sum, found by the arbitrator to be due from the plaintiff to the defendants, to be set off against the costs of the action brought by the former against the latter, inasmuch as the time within which the plaintiff was directed to make the payment to the defendants, had not yet expired; and, that, consequently, they were not in a situation to apply to set

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off a simple contract debt, against a judgment entered up on a verdict obtained, particularly as the plaintiff could not be brought into contempt, for the nonpayment of the sum ordered to be paid by him to the defendants, until two months had expired from the time of making the award.

Mr. Serjeant *Wilde*, in support of his rule.—Both debts are founded on judgments, the one entered up by the defendants on a warrant of attorney, and the other on a verdict, for the plaintiff, in this suit, by the order of the arbitrator. He directed that the sum due from the plaintiff to the defendants, should be paid within two months after the date of the award; and although the former might defer such payment until the last day, still he could not be entitled to sue out execution for the costs as taxed for him; and, in point of principle, the one sum ought to be set off against the other, particularly as the arbitrator named no specific day on which the sum due from the plaintiff to the defendants was to be paid, provided it were done within the space of two months from the time of the award.

Lord Chief Justice *BEST*.—The doctrine as to set off, in a case of this description, is founded on equitable principles, and we cannot carry it further than the law will allow us. It is, therefore, impossible for us to extend it so far as to hold the defendants to be entitled to succeed in this application. It is a well known principle, that, in all cases of set off, the debts must be mutual, and each party must have an immediate right to recover. As soon as the plaintiff's costs were taxed, he had an immediate remedy against the defendants, and was entitled to sue out execution. It is true, that the defendants have a demand against him, to nearly the amount of such costs, and which demand the arbitrator

directed to be paid within two months next after the date of his award. That time, however, has not yet expired, and one of the parties may become bankrupt before the day of payment arrives. The object of the present application is, to put us in the situation of the arbitrator. He perfectly knew what he intended at the time he made his award, and we can easily collect his intention; which was, that the defendants should pay the plaintiff the costs of his action, immediately on their being taxed; and that the latter should pay the debt due from him to the defendants, at any time within two months after the date of the award.

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The rest of the Court concurring—

Rule discharged with costs.

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WOODLEY and Another v. BROWNE and YOUNG.

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THIS was an action of trover, for the recovery of 356 quarters of wheat. At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiffs, being corn-factors, had, in August, 1824, sold the wheat in question, which was lying on board three vessels in the river *Thames*, to one *Loud*, of *Dover*, for whom the defendants, who were lightermen and granary-keepers in *London*, were in the habit of landing and warehousing grain, and that, in order to secure the payment of the price to be paid by *Loud*, it was agreed between the plaintiffs and the defendants, that the latter should land and stow the wheat, on the account

The stat. 1 & 2 Geo. 4, c. 87, does not require a corn-factor, under the 13th section, to return the name of the person to whom corn, when sold, is actually delivered. Where, therefore, corn-factors returned the name of *T. L.*, as a buyer of wheat, and afterwards paid the lastage duty on the delivery of the quantity returned—that although the

ed as sold to him:—Held, that they were not thereby precluded from shewing, corn was sold to *T. L.*, it was delivered to his granary-keepers, on the condition that they were to hold it for the factors until *T. L.* had paid them for it.

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of the former, and should hold it, on their account, until paid for by *Loud*; and that the defendants were not to know any other person in the transaction than the plaintiffs. The delivery notes addressed to the masters of the respective vessels, were as follows:—

“*Corn Exchange, August 9th, 1824.*

Captain of the	} lying at <i>Alderman's</i> ,
	Deliver for
	} quarters of wheat.
	Signed              (By the seller or his clerk.)”

The other two were similar, differing only as to the names of the masters and vessels.

The orders for the delivery of the wheat were given by the plaintiffs to *Loud*, and, by the latter, handed over to the defendants, the first being filled up as follows:—

“Deliver for Messrs. *Browne* and *Young*, 127 quarters. No refusal, unless a satisfactory reason given for such refusal the day after the date.”

The second was, “Deliver a further quantity for *Browne* and *Young*,” and the third was, to “Deliver for *Thomas Loud*,” and it appeared that the name of *Thomas Loud* had been originally inserted in the two former orders, but had been subsequently obliterated or struck through with a pen, and those of *Browne* and *Young* substituted.

On the 11th *August*, (two days after the sale), the plaintiffs made the following return to the corn-inspector, under the statute 1 & 2 *Geo. 4*, c. 87, s. 12 (a).

(e) By which it is enacted, “That cause to be returned, on the Wednesday in each and every week, to

*Return from the 9th to the 14th August, 1824, both inclusive.*

Wheat.	Sellers.	Buyer.	Price.	Amount.
356 qr. 6 bushels.	J. Wightman. Edwards, Raymond & Co. W. Doursing and J. Hayard.	Thos. Loud.	60s.	£1070 : 5 : 0

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The charge to the corn-inspector, for lastage, on this return, in pursuance of the 33rd section of the statute (*b*), was afterwards paid by the plaintiffs; and the defendants, on application being made to them, by the corn-meter, for the name of the buyer, in order to collect the metage, said that the wheat belonged to the plaintiffs, and that they had landed it for them. A commission of bankrupt having shortly afterwards issued against *Loud*, and the corn remaining in the warehouses of the defendants, a de-

the inspector of corn-returns, an account in writing, signed with his own name, or the name of his known agent, of the quantities of each respective sort of *British* corn, by him sold and delivered during the week, with the prices thereof, the amount of every parcel, with the total quantity and value of each sort of corn, and by what measure or weight the same was sold, with the names of the buyers thereof, and of the persons for whom such corn shall have been sold by him respectively, in default whereof every such corn-factor shall, for every such neglect, forfeit and pay 10*l.*"

(*b*) Which enacts, "That all *British* corn, that shall be brought into the river *Thames*, eastward of *London* bridge, and shall be sold and delivered, shall be charged with the sum of one penny *per last*, or ten quarters; and that it shall be lawful for the inspector of corn-returns, for the city of *London*, to demand, collect, and receive the same, from every corn-factor or importer of corn respectively, on whose account such *British* or foreign corn shall be sold and delivered, or shall be delivered out of the ship or vessel, in which the same shall have been imported, as the case may be; and that the corn-factor, or importer, shall deliver a full and true account of the quantity of the said corn, to the corn-inspector, within one week after the sale and delivery thereof, or the delivery thereof from the ship or vessel, with the name of the master or commander of such ship or vessel."

reign corn, when delivered out of any ship or vessel in the port of *London*, shall be charged with the sum of two pence *per last*, or ten quarters; and that it shall be lawful for the inspector of corn-returns, for the city of *London*, to demand, collect, and receive the same, from every corn-factor or importer of corn respectively, on whose account such *British* or foreign corn shall be sold and delivered, or shall be delivered out of the ship or vessel, in which the same shall have been imported, as the case may be; and that the corn-factor, or importer, shall deliver a full and true account of the quantity of the said corn, to the corn-inspector, within one week after the sale and delivery thereof, or the delivery thereof from the ship or vessel, with the name of the master or commander of such ship or vessel."

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mand for its delivery was made on them by the plaintiffs, and on their refusal the action was brought.

His Lordship left it to the Jury to say, whether the plaintiffs had, under all the circumstances, delivered the wheat to the defendants conditionally, to hold for them, and on their account, till *Loud* had paid them for it, or, whether they had delivered it to *Loud*, or to the defendants, as his agents, and on his account; and his Lordship was of opinion, that the return made by the plaintiffs, of the wheat having been sold and delivered to *Loud*, did not conclude them. The Jury found that the defendants had acquiesced in holding the wheat on the plaintiffs' account, and gave a verdict for the latter—Damages, 1070*l.*

Mr. Serjeant *Wilde*, having, on a former day in this Term, obtained a rule to shew cause why this verdict should not be set aside, and a new trial granted, on the ground that the return of the sale, by the plaintiffs, to the corn-inspector, was conclusive, in vesting the property of the wheat in *Loud*, the bankrupt:—

Mr. Serjeant *Vaughan* now shewed cause, and submitted, that, although *Loud's* name appeared in the return as the buyer of the wheat, yet that the plaintiffs were not estopped from shewing that it was not to be delivered to him. The only object of the Legislature in passing the statute, was to learn the quantities of corn sold, and their prices, from which the average value might be ascertained; by the 11th section of the statute, a corn-factor is required to make and sign a declaration in writing, that the returns of the quantities and prices of corn contain the whole quantities, and no more, of the corn *bond fide sold and delivered* by or for him, within the period to which they shall refer, with the prices of such corn, and the names of

the buyers respectively, and of the persons for whom such corn shall have been sold by him; which declaration, so subscribed, must be delivered to the Lord Mayor. And in case any person shall carry on the trade or business of a corn-factor, without making such declaration, every such person shall forfeit and pay the sum of 50*l.* Here the plaintiffs made a return in pursuance of that section, naming *Loud* as the buyer.—The learned Serjeant was proceeding with his argument, when the Court called on—

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Mr. Serjeant *Wilde*, to support his rule.—He contended, that, as the plaintiffs, on the face of their return to the corn-inspector, as directed by the statute, inserted the name of *Loud* as the buyer of the wheat, such return must be taken to be conclusive evidence of a complete sale and delivery to him; and that the plaintiffs were consequently estopped from shewing that the delivery was not made to him, but that the wheat was placed by the plaintiffs in the defendants' hands, with a condition that the latter should hold it for the former, until paid for by *Loud*. The statute requires a return to be made of all corn *sold* and *delivered*; and there can be no return made to the inspector, until the actual *delivery*. The object of the Legislature was, to ascertain not only the *sale* and price of corn, but also the party to whom it was *bond fide delivered*, and that he was the real purchaser; otherwise, it would be impossible to prevent frauds that would be daily practised, in making fictitious sales, in order to influence the averages. All the facts attending a sale and delivery of corn, in order to comply with the terms of the statute, should be returned and set forth with the same precision as is required by the ship-register acts; the enactments in question being made for the public interest. And in *Mestaer v. Gillispie* (a), Sir Wm. Grant said, “it is to be

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considered that this act (*a*) was framed, not for the purpose of ascertaining the rights of parties against each other, or protecting them from fraud, but with the view to a great purpose of public policy; and the act, in all its provisions, compels them to observe regulations, not in any degree requisite for their own private interests, in order to accomplish the ends of the act. It may be said, the Legislature having proposed their object, proposed the only means by which that object was to be secured; judging of the propriety of enforcing that object, and by such means embracing that object, and prescribing those means, whatever inconvenience might result to private individuals. The harshness, therefore, in particular instances, is not to be taken into consideration: the object being, not to provide for the interests of parties as against each other, but, at all events, to attain that great object of public policy, to which it might be thought right to sacrifice individual convenience and justice, according to ordinary rules." So here a great public object was meant to be attained; and, if a mere constructive delivery be held sufficient, it will tend to destroy the *bona fides* of every transaction. The only true mode of ascertaining the price on a sale of corn, is by returning the name of the party to whom it was delivered; if not, it might be continually shifting from one party to another. But independently of the return made by the plaintiffs to the inspector, in the first instance, they afterwards paid him his charge for lastage on the delivery of the quantity returned as being sold to *Loud*, pursuant to the 33d section of the statute: and that, coupled with the former return, is not only conclusive evidence of a sale, but also of a delivery to *Loud*; and, therefore, the property in the corn was vested in his assignees, and the plaintiffs have no title to maintain this action.

Lord Chief Justice BEST.—It is not necessary for us to

(*a*) Ship-registry Act, 26 Geo. 3, c. 60.

decide, in this case, whether the return of the sale of the wheat made by the plaintiffs to the corn-inspector, subjected them to the penalty imposed by the 11th section of the statute. Although *Loud* purchased the corn of the plaintiffs in the first instance, the Jury have found that they, not choosing to trust him, although they handed over the delivery notes to him, before the wheat was delivered to the defendants, got them to undertake to hold it on the plaintiffs' account; and the defendants agreed to know no other person in the transaction than them. That was clearly proved at the trial. In the course of the cause the return in question was given in evidence, when it was contended, that, as the plaintiffs had therein named *Loud* as the buyer, it was conclusive to shew a delivery to him, as well as a sale. But I am of opinion, that the return does not touch this case. The only question is, whether, although the corn were sold to *Loud*, it were ever delivered to him; and the Jury have expressly found that it was not. The return did not shew a delivery to *Loud*, and the delivery notes merely stated, that the wheat should be delivered for him. Did then the Legislature intend, in passing the statute 1 & 2 Geo. 4, c. 87, to make the mere act of sale evidence of a delivery? I am clearly of opinion that they did not; and that the only object of the act was to ascertain the quantity of corn sold, the persons for and to whom it is sold, and the prices: and that is all that can be required, in order to ascertain the average prices throughout the kingdom. I fully approve of the policy of the corn laws, and wish that every possible effect may be given them: the principle, as applied to this case, on which they are founded is, that no wheat can be imported into this country, so long as the average price continues under 80s. *per quarter*. To control such importation, it is only necessary to ascertain the quantities sold, and the prices; and when a return is made, as to such quantities and prices, the average may be easily and satisfactorily determined, by

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which the opening of foreign ports may be regulated. It is, therefore, wholly immaterial to whom the corn is delivered. It is beside the policy of the act, as the quantity sold is only to be looked at. If the Legislature had intended that the return should specify to whom corn sold, is delivered, they would have so expressed it, but no such terms are contained in any clause of the act; if there were, the reasoning of Sir William Grant, in *Mestaer v. Gillispie*, might apply, but throughout the whole of the statute, the name of the person to whom the corn is delivered, is not required to be introduced; all that is necessary, is the return of the quantity and price of the article sold. The 11th section directs, that every corn-factor, carrying on his business in *London*, within one month after the passing of the act, shall make a declaration that the return of the quantities and prices of British corn, which thenceforward shall be by or for him sold and delivered, shall, to the best of his knowledge, contain the whole quantity and no more of the corn, *bond fide* sold and delivered by or for him, with the prices of such corn, and the names of the *buyers* respectively, and of the persons for whom such corn shall have been sold by such factor respectively, conformably to the directions of the statute. But that section does not require the name of the party to whom the corn is delivered, to be stated in the declaration, but only the quantities sold, prices, and names of the sellers and buyers. So the 12th section, which directs corn-factors to make weekly returns, only requires the names of the buyers, and the persons for whom such corn shall have been sold, but not of the person to whom it is delivered; and *expressio unius est exclusio alterius*. The 33d section was introduced for a different object; *viz.* to secure the payment of the duties imposed for carrying the purposes of the act into execution, and payable to the inspector, at the rate of *1d. per last*. The name of the person to whom the corn may be delivered, is not required to be stated, but merely the

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quantity sold and delivered, and the name of the master of the vessel ; and here it was proved, that the plaintiffs paid the inspector's charge for lastage, in pursuance of that section: and the 35th section enacts, " that it shall be lawful for the Lord Mayor and Aldermen, at any quarterly sessions, holden for the city, to examine the inspector of corn returns, who is required to declare and make known, whether any of the corn-factors or importers have neglected or refused to pay and discharge any sum due from them, on account of the lastage dues on corn, by them sold and delivered, or imported, as the case may be." But neither of those clauses shews that it was the duty of the plaintiffs, as corn-factors, to insert in the return, or inform the inspector of, the name of the party to whom the corn was actually delivered. I am, therefore, clearly of opinion, giving the fullest possible effect to the statute, that the return of the sale to *Loud* is not of itself conclusive, to shew that the corn was delivered to him : and although it has been said, that, if the returns did not point out the real vendor and purchaser, it would open a door to fraudulent and fictitious bargains; yet it must be considered, that in transactions of such a nature, the parties may be indicted for a conspiracy; and if there be any sinister bargain to raise the price of corn beyond what it really ought to be, for the purpose of letting in foreign grain, whether it be provided for by the statute or not, a summary remedy is given by the general policy of the law. On the whole, therefore, the Jury having found, and they were fully warranted in so doing, from the evidence before them, that the defendants undertook to hold the wheat in question, conditionally, for the plaintiffs, I am of opinion, that there is no reason to disturb their verdict.

The rest of the Court concurring—

Rule discharged.

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ELIZABETH DOKER, Executrix of JOHN GOFF, v.  
— HASLER, Esq.

If a writ of *s. fa.* be not delivered to the sheriff for the purpose of execution, and the goods of the party against whom it issued be taken under a second writ, the sheriff may return *nulla bona* to the first. Where, therefore, the plaintiff's attorney enclosed a writ of *s. fa.* to the sheriff's officer, in a letter, and told him that he might, with safety, put the defendant's mother, or any one else, in possession of the defendant's goods, and the officer acted accordingly, and left his warrant in the charge of one of the defendant's shopmen, and the business was transacted as usual for nearly three months, from the time the warrant was left; and the shopman accounted to the officer for the monies received, who paid them over to the sheriff; the defendant having become bankrupt, his assignees indemnified the sheriff in returning *nulla bona* to the writ issued previously to the bankruptcy: in an action against the sheriff, for a false return, the Jury having found that the writ was sued out for the purpose of protecting the property of the party against other creditors, the Court refused to grant a new trial, on the ground that the plaintiff had not made out the allegation in her declaration, that the writ was delivered to the sheriff to be executed in due form of law.

THIS was an action on the case, and brought against the defendant, the late sheriff of Sussex, for a false return of *nulla bona*, to a writ of *scire facias*, issued at the suit of *John Gaff*, the testator, against the goods of his son, *William Gaff*, a linen-draper at *Brighton*. The first count of the declaration stated, that the testator, in *Hilary Term*, 1 & 2 Geo. 4, recovered a judgment against one *William Gaff*, for a debt of 3000*l.*, and 84*s.* for his damages, whereof the said *William Gaff* was convicted. That the judgment remaining in full force, and the debt and damages being unpaid and unsatisfied, the testator, on the 10th *April*, 2 Geo. 4, sued out a writ of *s. fa.*, directed to the sheriff of *Sussex*, by which he was commanded to levy 1559*l.* 6*s.*, besides poundage, &c. which writ was, on the said 10th *April*, delivered to the defendant, as sheriff, to be executed in due form of law. That the defendant, as such sheriff, on the 11th *April*, seized and took divers goods and chattels of the said *William Gaff*, in execution; but that the defendant, not regarding his duty as such sheriff, but contriving, &c. falsely returned that the said *William Gaff* had not any goods or chattels in his bailiwick, whereof the defendant, as such sheriff, could cause to be levied the debt and damages aforesaid:—To the damage of plaintiff as executrix. The second count was for not levying under the writ, and returning *nulla bona*; although the defendant, as sheriff, might have levied the monies so indorsed on the writ.

At the trial, before Lord Chief Justice *Best*, at Guild-

*hell*, at the sittings after the last Term, an examined copy of the judgment, writ of *sc. fa.*, and the sheriff's return of *nulla bona*, were put in and proved; and it appeared, that the writ was executed on the 11th *April*, 1821. A letter was then produced, dated on the preceding day, and written, by the testator's attorney, to the sheriff's officer who executed the writ, which stated, that he, (the attorney), had issued a *sc. fa.* against the effects of *William Goff*, and that the officer was to levy at all events; and it concluded by saying, " You may with safety, and have my consent to put Mrs. *Goff*, (the defendant's mother,) or any one else you please, in possession, and permit and suffer the trade and business to be carried on as usual, under the defendant's direction." The officer, accordingly, after having made the levy, left the warrant in the house, with one of *Goff's* shopmen, (*Goff* himself being absent,) desiring the shopman to carry on the business as usual, and to account to him, (the officer), for all monies received in the shop. The business was carried on in this manner, until the 28th *June*, 1821; the money received for goods sold in the shop during that period being paid to the officer, who handed it over to the sheriff; and no part of the money was ever given to the testator or to his attorney.

A commission of bankrupt having, on the 14th *June*, issued against *William Goff*, and he being thereupon duly declared a bankrupt, his assignees, considering that the execution put in by his father was fraudulent, the bankrupt still continuing in possession, and that there had been no sufficient transfer of the property to exclude them, indemnified the defendant, who, thereupon, returned *nulla bona*; in consequence of which the present action was brought by the executrix of *William Goff's* father. His Lordship directed the Jury to consider, whether the *sc. fa.* had been issued with a view to levy the amount of the monies indorsed thereon, or merely for the purpose of protecting the property of *William Goff*, the testator's son, against his other creditors;

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and, whether there were a *bond fide* debt due from him to his father. His Lordship also left it to the Jury to determine, whether or not the plaintiff had made out all the allegations in her declaration; and told them, that if they were of opinion that the writ was issued, not for the purpose of selling the goods, but to protect them, the plaintiff had failed to establish that it was delivered to the defendant to be executed in due form of law.

The Jury found, that, although there was a *bond fide* debt due to the testator, yet that the levy under the *f. fa.* was merely intended to protect the property, and they accordingly found a verdict for the defendant.

Mr. Serjeant *Vaughan*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground of a misdirection by his Lordship. He submitted, that, as the sheriff, and not the assignees, was the defendant on the record, he could not be justified in returning *nulla bona*, or defend himself on the ground of a supposed fraud, or misapplication of the process which he was required to execute, to which he had lent himself; and, admitting that the direction to the Jury would have been proper had the action been trover against the assignees, it could not be so in an action against the sheriff, who had certainly made a false return.

The Court were at first inclined to make the rule absolute for a new trial, but

Mr. Serjeant *Pell*, and Mr. Serjeant *Wilde*, now shewed cause, and contended, that the sheriff, being indemnified by the assignees in making his return, must be considered as representing their rights, and standing in the same situation as they would have done, in case an action had been brought against them; and they must be taken as new creditors, with a second execution. It appeared

at the trial, and the Jury found the fact, that the execution was sued out merely for the purpose of protecting the property of the testator's son, against the claims of his other creditors, which was evident from the letter of the attorney to the officer, when he directed him to levy. The execution was therefore fraudulent, and the Legislature anticipated such a case as this when they passed the statute 13 Eliz. c. 5, as the execution was clearly colourable, and sued out with an intent to delay *bond fide* creditors; and if an execution, founded on a judgment for a *bond fide* debt, be sued out by one creditor, with intent to protect the property of the debtor, or to delay other creditors, it falls within the mischief intended to be remedied by the statute. In *Rice v. Sergeant* (a), where *A.* had judgment against *B.*, for a just debt, took out a *fi. fa.*, and got the sheriff to seize, but would not let him proceed further, and let the goods remain in *B.*'s hands; *C.*, who had also a judgment for a just debt against *B.*, took out a *fi. fa.*; and it was held that *C.* might seize the goods; for that the former was a *fraudulent execution*, and the sheriff might very well return *nulla bona* on it. That case is borne out by several authorities. In *Bradley v. Wyndham* (b), where a first writ of *fi. fa.* was executed fraudulently, and a second was afterwards executed at the suit of another, it being left to the Jury to say, as in this case, whether the first writ were intended to be, or were really, executed, and they thought it was not, the Court held that the question was properly left. In *Smallcomb v. The Sheriff of London* (c), although it was held, that a sheriff is bound to execute the first writ that is delivered to him; yet it was there determined, that no action lay against the sheriff, because he who delivered his first writ would not take a warrant from the sheriff to levy the goods; so that it seemed he had a design only to

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(a) Vin. Abr. tit. "Fraud," (G) (b) 1 Wila. 44.  
pl. 3. (c) 1 Ld. Raym. 281.

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keep the execution in his pocket, to protect the defendant's goods by fraud. The same intention was manifested in this case. And Lord Chief Justice *Holt* there said, "if a writ of execution be delivered to the sheriff against *A.*, and he become bankrupt before it is executed, the execution is superseded; and, consequently, the property of the goods is not absolutely bound by the delivery of the writ to the sheriff." And here the execution was fraudulent, as the party suing it out had no right to suspend its operation, and thereby prevent the other creditors from coming in.

At all events, the assignees are entitled to claim the goods in question, under the statute of *James*, as being in the possession and disposition of the bankrupt at the time of his bankruptcy. In *Jackson v. Irvin* (*a*), where a warrant, under a *fi. fa.*, against the goods of a trader, was directed to his servant and another person, as special bailiffs, and they, in consequence, took possession of the goods in his shop, and the business was apparently carried on as usual, but without the trader's interference; and the trader had, in the mean time, committed an act of bankruptcy:—it was held, that the goods passed under the commission to the assignees; as the possession of the servant was the possession of the master; and that the goods were thus in the possession, order, and disposition of the bankrupt, at the time of the bankruptcy. But this case falls expressly within that of *Toussaint v. Hartop* (*b*), where *A.* levied an execution on the goods of *B.*, a trader, and directed the sheriff's officer not to sell, but to leave a man in possession with the warrant, and *B.* carried on his business as usual, and five months afterwards became bankrupt.—Lord Chief Justice *Gibbs* held, that, notwithstanding the execution, and the possession of the officer, the goods seized passed to the assignees, by virtue of the statute of *James*. In *Payne v. Drewe* (*c*),

(*a*) 2 Campb. 48.

(*b*) Holt N. P.C. 335.

(*c*) 4 East, 523.

which was an action against the sheriff for a false return, it was held, that although a writ of *s. fa.* binds the goods as against the defendant, yet the property is not divested out of him till execution executed; and therefore, that an execution and sale under a subsequent writ delivered to the sheriff, would bind the goods. And Lord *Ellenborough* there said (*a*), "it appears to me not to be contradictory to any cases, nor any principles of law, and to be mainly conducive to public convenience, and to the prevention of fraud and vexatious delay in these matters, to hold, that where there are several authorities equally competent to bind the goods of a party, when executed by the proper officer, that they shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed." In *Kempstead v. Macsuley* (*b*), Lord *Kenyon* decided, that if a *s. fa.* be delivered to the sheriff, and he be directed not to levy thereon till a future day, and in the mean time another writ be delivered, he is not to keep the first writ hanging over the heads of the other creditors, but to levy under the last execution, as if no other writ had ever been delivered to him; and in *Blades v. Arundale* (*c*), where a sheriff's officer executed a writ of *s. fa.* by going to the debtor's house and informing him that he came to levy on his goods, and, laying his hand on a table, said, "I take this table," and then locked up his warrant in the table-drawer, and took the key and went away, without leaving any person in possession; and after the *s. fa.* was returnable, but not continued, the landlord distrained the goods for rent:—it was held, that the sheriff could not maintain trespass against him, as he had relinquished the possession, by the officer's quitting the premises after the seizure. So here, unless the sheriff had actually levied

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(*a*) 4 East, 545.    (*b*) Peake's N. P. C. 66.    (*c*) 1 Mau. & Selw. 711.

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and continued in possession of the goods under the execution, or they had remained in the actual custody of his officer, the plaintiff has no remedy against him, as he was justified in returning *nulla bona*; and, in order to maintain this action, she should have shewn that the writ was delivered to him to be executed in due form of law. And if it were issued with a fraudulent intention, or for the mere purpose of protecting the property of the debtor against the claims of just creditors, the sheriff was not bound to execute it at all; and the plaintiff cannot be entitled to the fruits of it, as neither she nor her testator had caused it to be put in force, previously to the bankruptcy of the testator's son.

Mr. Serjeant *Vaughan*, in support of the rule, contended, that as this was an action against the sheriff for a false return, and not an action of trover, it was immaterial whether he were indemnified by the assignees or not:—that, as he had been guilty of negligence, if not fraud, in not causing the writ to be duly executed, he was estopped from taking any objection, on the ground of the instructions given to his officer at the time he was directed to levy, and that, at all events, he had been guilty of a false return. That the Jury having found that the debt, on which the judgment was founded, due to the bankrupt's father, was a *bond fide* debt, the execution was valid, the statute of *Elizabeth* operating only where the judgment is fraudulent, or the party suing it out is not a *bond fide* creditor at the time. A writ being once in the hands of the sheriff, he is bound to execute it, and nothing will warrant a return of *nulla bona*, where the officer, who levied under the writ, retained possession on account of the party at whose instance the execution was sued out. In *Bradley v. Wyndham*, the bailiff merely rode round the farm and said, "I seize all this corn and cattle," and took some account thereof; and that was held to be insufficient, or that, at all

events, a Jury might find it to be fraudulent as against a *bond fide* creditor. So in *Smallcomb v. The Sheriffs of London*, the party who delivered the first writ refused to take a warrant from the sheriffs to levy the goods; but here a levy was actually made, and though the officer did not personally remain in possession, he regularly received all monies taken for any goods that might be sold, which was equivalent to his continuing in possession. In *Jackson v. Irvin*, the warrant was delivered to the bankrupt's own servant; and Lord *Ellenborough* there said, "if it had been delivered to a bound bailiff, and he were put in possession, all would have been right." That was done in this instance; and as the judgment was obtained and the execution issued for a *bond fide* debt, there ought, at all events, to be a new trial.

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Lord Chief Justice *BEST*.—I have often heard it said, that second thoughts are best, but have generally found it the reverse, as we frequently get rid of common sense by too nice refinement. The view I took of this case at the trial, notwithstanding I have since entertained a doubt as to the mode in which I left it to the Jury, appears to me now to be correct. Although it was an action against the sheriff for a false return, it was incumbent on the plaintiff to make out and establish her case, on the strength of which she can only be entitled to recover. She ought therefore to have made out that which she has alleged in her declaration, *viz.* not only that there was a good judgment, but that the writ, under which the goods of *Goff* were seized, was delivered to the defendant, as sheriff, to be executed in due form of law; and unless both these facts were proved, she could not be entitled to succeed in this action. Although it has been said that a sheriff cannot set up a false return, and take advantage of his own neglect, in not having seen that the writ was properly executed, still he might require the plaintiff, before he offered any defence, to

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" Hamble.

prove all the allegations in her declaration. I left it to the Jury to say, whether they were satisfied that the writ was issued and delivered to the sheriff to be executed in due form of law, *cis.* as requiring him to sell the goods of the then defendant, and pay over the proceeds to the party at whose instance it was sued out; and I told them, that if they were of opinion that it was not, but was merely issued to protect the goods against the claims of other creditors, the plaintiff could not recover, as she had not proved all the allegations in her declaration. A special Jury expressly found, that the execution was sued out with a view only to protect the property, and I am perfectly satisfied with the verdict. Indeed, they could not have found otherwise, after the letter from the attorney of the bankrupt's father, by whom the levy was directed to be made, had been read to them, in which he told the officer that he might, with safety, put *Goff's* mother, or any one else he pleased, in possession, and suffer the business to be carried on as usual, under the defendant's direction. The officer acted according to that direction; and, immediately after the levy, delivered the warrant to one of the shopmen, who continued to carry on the business as before, and the officer, ten weeks after the levy, received a certain sum, for goods sold in the shop during that period. No authority was cited at *Nisi Prius*, and I therefore left it to the Jury, on the broad principle, that if the writ were issued merely to protect the goods of the party, the defendant was entitled to a verdict. But it appears to me to be impossible to distinguish this case from two of those which have now been presented to our notice. In *Bradley v. Wyndham*, the bailiff merely rode round the farm; and in *Blades v. Arundale*, the officer locked up his warrant in the drawer of a table, and went away; and it was held, in both these cases, that the execution could not be supported. So, here, the officer delivered his warrant to the shopman, and immediately afterwards left the premises. As the writ was never exe-

cuted, the statute of *Jones* has nothing to do with the question; because the property to which the writ was intended to apply, was never the property of the testator, or of the plaintiff, but of the bankrupt himself, and it always continued in his possession. It is true, the testator, or the plaintiff, as his executrix, might have divested the bankrupt, by causing a writ to be duly executed before the claims of the assignees accrued; yet, as they omitted to do so, and the testator did not intend that the writ should be actually put in force against his son, the latter was never deprived of his property; and as he continued in possession at the time of his bankruptcy, it vested in his assignees, and the defendant would have been liable to them if he had made a different return.

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Mr. Justice PARK.—Although Lord *Mangold* said that if he had formed an erroneous judgment at *Nisi Prius*, he was always desirous that the cause should go down to a new trial; yet, he observed, that first thoughts were sometimes best, and that a person very frequently missed the mark by taking too long an aim. I was at first inclined to think that the view my Lord Chief Justice took of this case at the trial, was wrong; but I am now of a different opinion, and do not decide on the ground of the indemnity given to the sheriff by the assignees, but on the ground that it was incumbent on the plaintiff to make out her case, by proving the facts alleged in the declaration. The statutes of *Jones* and *Elizabeth* appear to me to have no bearing whatever on the question. The plaintiff cannot maintain an action against the sheriff, if the party from whom she derived title, was the cause of the writ's not being duly executed in the first instance; the declaration alleges that it was delivered to the defendant for that purpose, but that was not so; for it clearly appears to be otherwise, from the letter of the attorney himself, who enclosed it to the officer, instructed him how to act, and consented

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to his putting any one he pleased in possession. *Blades v. Arundale* was an action of trespass, by the sheriff, against a landlord who had distrained for rent, after a sheriff's officer had executed a writ of *fieri facias*; yet, as it appeared that he merely went to the defendant's house, and informed him that he came to levy on his goods, but made no manual or actual seizure, except laying his hand on a table, and saying "I take this table," and then locked up the warrant in the table drawer, and took the key, and went away without leaving any person in possession:—Lord *Ellenborough* held, that as soon as the sheriff had abandoned the possession, (and there was nothing to shew a continuance of it after the officer who made the seizure withdrew,) it reverted back to the original owner.

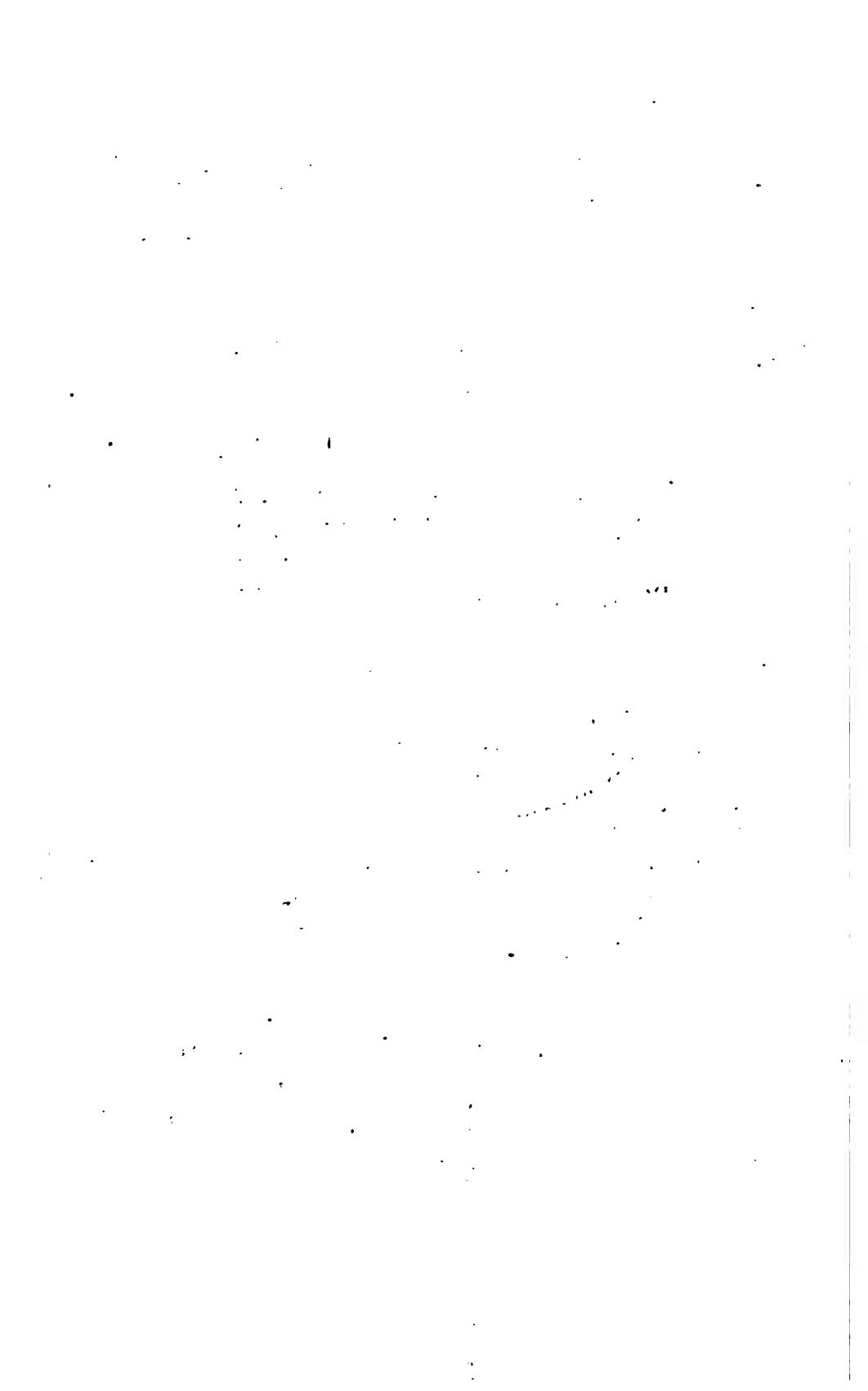
Mr. Justice BURROUGH.—It is quite clear that the sheriff has made a false return; he is highly culpable in having done so, as he might have required to have been indemnified by the Court in the first instance; and if so, he would not have been compelled to make such a return. But the plaintiff should not only have shewn that she had sustained an injury by such false return, but have been enabled to support all the averments in her declaration; and as it appeared in evidence that the writ was not delivered to the sheriff to be executed according to law, but merely to protect the property of the testator's son, against his other creditors, and not to satisfy the demand of the father, from whom the plaintiff derived her title, she cannot support this action. The execution was engendered in fraud and contrivance, and the plaintiff has not only failed in establishing the averments in her declaration, but the Jury have found a verdict on the facts before them, which were conclusive to shew for what purpose the writ was originally stied out.

Mr. Justice GASELEE.—The only doubt I have entertained is as to the money received by the officer, and by him

paid over to the sheriff; but when I see the purport for which the execution was sued out, and that it was not intended to satisfy the bankrupt's father, and such money was not received to satisfy his debt, but to enable the son to defraud his other creditors; my difficulty, as to that point, is removed: and the only question is, whether we be prevented by any technical rule from protecting the sheriff, or whether he be estopped from asking it by the return he has made. It appears to me, that the cases to which we have been referred, relieve us from all difficulty on this point, and the principle deducible from them is, that if a writ be not delivered to the sheriff for the purpose of being executed at the time, and the goods be taken under a subsequent writ, the sheriff may return *nulla bona* to the first; and here, as the writ was issued for the mere purpose of protecting the property of the debtor against his other creditors, the assignees stand in the same situation as new creditors with a second execution. The writ was not intended to be executed before the bankruptcy, nor was it. We are, therefore, not to be concluded by any technical rules; and as the statutes adverted to appear to me to be wholly beside the present question, and the plaintiff failed to make out a most material allegation in her declaration, viz. that the writ was delivered to the defendant to be executed in due form of law, there is no reason to disturb the verdict, which is consonant with the justice of the case. This rule must consequently be

Discharged.

END OF HILARY TERM.



CASES  
ARGUED AND DETERMINED  
IN THE  
Courts of Common Pleas  
AND  
Exchequer Chamber,  
IN EASTER TERM,

IN THE SIXTH YEAR OF THE REIGN OF GEORGE IV.

GUEST and FURNIVAL v. JAMES WILLASEY, an Infant, MARY  
J. WILLASEY, SARAH C. WILLASEY, WILLIAM WILLA-  
SEY, EDWARD WILLASEY, MARIA RUTH WILLASEY,  
ALICIA WILLASEY, also Infants, and NICHOLAS SALIS-  
BURY and ABRAHAM GARNETT.

1825

THE following case was directed, by his Honor the Master of the Rolls, to be sent for the opinion of the Judges of this Court:

*James Willasey*, by will dated the 10th *February*, 1814, which was executed and attested so as to pass real estates, after devising an estate called *Clifton Hall*, to his son *James*, in fee, gave and bequeathed to *Nicholas Salisbury*

A testator, by his will, duly attested, after devising his *Clifton* estate to his son, in fee, devised all his *Orchard* estate to trustees, (whom he named his executors), and their heirs, directing them to sell it;

having afterwards sold his *Clifton* estate, and purchased another called *Allerton Hall*, he, by a codicil, written on the back of the will, attested by two witnesses only, directed that the money obtained from the sale of the *Clifton* estate, should go to a general fund, to be divided amongst all his children, and also that *Allerton Hall* should be sold, and its produce applied in like manner; and he appointed his wife an executrix jointly with those named in the will. By a second codicil, also attested by two witnesses only, he, after stating that one half of the *Orchard* estate was sold, and giving directions as to the sale of the other half, appointed new executors in lieu of those named in the will; subsequently, he made a third codicil, duly attested, by which he merely appointed another executor in the room of one of those last named; all the codicils were written on the back sheet of the will:—Held, that the *third* codicil operated as a republication of the will, and of the second codicil; and that the legal fee in the *Allerton* estate passed by the will, so republished, to the trustees therein named.

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and *Abraham Garnett*, their heirs and assigns, all his plantation called *Orchard estate*, situate at *Port Royal* in *Jamaica*, with the slaves, stock, utensils, and appurtenances thereon or thereto belonging; and also all and singular his real estate and property whatsoever, situate in *Great Britain*, the *West Indies*, or elsewhere, which he might die seised or possessed of, or in any wise interested in or entitled to, in possession, reversion, remainder, or expectancy, not thereinbefore devised by him, with their appurtenances, to hold the same unto and to the use of them, *Nicholas Salisbury* and *Abraham Garnett*, their heirs and assigns, for ever, upon trust to sell the same in manner therein mentioned, and to convey and surrender the same, unto, or to the use, or in trust for, the purchaser or purchasers thereof; and as touching his personal estate, after payment of his debts, funeral and testamentary charges, and the specific legacies therein bequeathed, the testator gave the same to the said *Nicholas Salisbury* and *Abraham Garnett*, his trustees, their executors, administrators, and assigns, upon the trusts therein mentioned; and he appointed the said *Nicholas Salisbury* and *Abraham Garnett*, executors of his will.

Some time after making the will, the testator sold *Clifton Hall*; and in 1818 purchased, and became legally seised in fee simple of, a freehold estate called *Allerton Hall*.

On the 18th November, 1819, the testator signed a codicil to his will, which was attested by two witnesses only, in the following words: "Codicil to my last will, dated this 18th November, 1819. *Clifton Hall* being sold, it is my wish that the money so obtained shall go to the general fund, to be divided amongst all my children, and not to *James* only, as the will directs; And also my late purchase of *Allerton Hall*, to be sold, and the money so obtained to be equally divided amongst all my children, share and share alike, as the will directs. And I give unto my wife *Mary Willasey*, in addition to what

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a.  
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the will mentions, 300*l. per annum* for life; and I also appoint her an executrix jointly with the others named in my last will and testament. As witness my hand, this 18th day of November, 1819."

On the 30th *September*, 1823, the testator signed another codicil, which was also attested by two witnesses only; wherein, after revoking a legacy given by the will, and stating that one half of the *Orchard* estate was sold, and giving directions concerning the sale of the other half, the testator proceeded as follows:

"I now appoint *Edward Lister*, of *Everton*, and the Reverend *James Furnival*, of *Upton*, my executors, in the place of *Nicholas Salisbury* and *Abraham Garnett*, within mentioned, with full power to act, &c. as witness my hand, this 30th day of *September*, 1823."

On the 13th *February*, 1824, the testator made another codicil, which was executed and attested, as by law is required, for passing freeholds by devise, in the following words:

"I now appoint my friend the Rev. *Benjamin Guest*, of *Everton*, near *Liverpool*, to be my executor, in the room of *Edward Lister*, of *Everton*, above mentioned, with full power to act, &c. Witness my hand, this 13th *February*, 1824."

All the codicils were written on the same sheet, which was the back sheet of the will.

The testator died on the 17th *February*, 1824. His widow survived him, but died before this case was prepared.

The questions for the opinion of the Court were, *First*, whether the *third* codicil operated as a republication of the will, and *first* and *second* codicils, or any or which of them. *Secondly*, whether the legal fee in the *Allerton* estate passed by the will and codicils, and to whom, or whether it descended to the heir at law of the testator.

The case was argued in the last *Michaelmas* Term, when

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Mr. Serjeant *Pell*, for the plaintiffs, contended, that the third codicil was a republication of the will, as well as the two previous codicils. The will and last codicil, having been duly executed and attested, must be considered as one entire instrument, as the will was not completed till the last codicil was executed, both being written on the same sheet of paper. Although the decisions which bear on this point are somewhat conflicting, yet, the intention of the devisor must be considered; and here the question is, whether he meant that the last codicil should have the effect of attracting and incorporating the will and intermediate codicils or testamentary papers. The principal and leading case is that of *Barnes v. Crowe* (*a*), which established the doctrine, that every codicil, unless it be confined in expression, is a republication of a previous will, if such codicil be duly executed and attested; and it was there held, that lands purchased after the will was made, passed by it, although the codicil related to personal property only; and Lord Commissioner *Eyre* said (*b*), "the testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself: because, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three." Although in *Penphrase v. Lord Lansdown* (*c*), and *Lytton v. Viscountess Falkland* (*d*), it was held, that there could be no republication by implication since the statute of frauds, but that the will must be re-executed; yet those cases were over-ruled by that of *Acherley v. Vernon* (*e*), where it was decided, that a codicil,

(*a*) 1 Ves. 486; *S. C.* 4 Brown's Chan. Cases, 2.

(*b*) 1 Ves. 497.

(*c*) Com. Rep. 384; *S. C.* Vin. Abr. tit. "Devide," Z, (22).

(*d*) Com. Rep. 383; *S. C.* Vin. Abr. tit. "Devide," Z, (24); 2 Eq.

Cas. Abr. 768.

(*e*) Com. Rep. 381; *S. C.* 3 Brown's Parl. Cas. 107.

signed and published in the presence of, and attested by three witnesses, was a republication of a will of land; and that both made but one will. In *Pigott v. Waller* (a), although Sir William Grant was disposed to break in on the doctrine laid down by Lord Commissioner Eyre, in *Barnes v. Crowe*; yet he submitted to that authority, saying, that "it afforded a certain rule, and that if he departed from it, it would only be to set every thing loose again." The codicil in *Pigott v. Waller*, related to personal property only, and the testator expressed no intention therein to republish his will; and yet it was held to pass after-purchased lands, there being a general devise of lands in the will. In the *Attorney-General v. Downing College* (b), Lord Chancellor Camden laid down, that the mere annexation of a codicil to a will was one of the modes by which an intention of the testator might be shewn, and was therefore a republication. Here, however, the will and all the codicils are written on the same sheet of paper; and in *Goodtitle d. Woodhouse v. Meredith* (c), Lord Ellenborough said, "as to the question, what the effect of a codicil is, that has been settled in a series of cases, beginning with *Acherley v. Vernon*, down to *Barnes v. Crowe*; and lastly, in a more recent case of *Pigott v. Waller*. The effect of all these decisions is to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless, indeed, a contrary intention be shewn, in which case it will repel that effect. Such was the case of *Bowes v. Bowes* (d), where the codicil devised the *said* lands; which word *said* was considered by the Judges as controlling the effect and operation of the codicil, confining it to those lands which would have passed under the will as it originally stood, and not extending the will to all the lands at the date of the codicil." "But," continued his Lordship,

(a) 7 Vea. 121.

(b) Ambler, 571.

(c) 2 Mau. &amp; Selw. 13.

(d) 2 Bos. &amp; Pul. 500.

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"here the codicil draws the will down to its own date, in the very terms of the will, and makes it operate as if it had been then executed in those terms." That is expressly in point, and here it is most material to consider the intent of the testator. Although the first and second codicils were not duly executed and attested, yet as the last was, it renders the whole operative; and if there had been no intervening codicil, it is quite clear that the last would amount to a republication of the will; and this, not only on principle, but as recognized by all the authorities on the subject; and if so, the legal estate in the property devised is in the plaintiffs, *Guest* and *Furnival*, as the executors named and appointed by the testator, in the second and last codicils.

Mr. Serjeant *Bosanquet*, *contra*.—The third or last codicil cannot be considered to operate as a republication of the will, so as to pass after-purchased lands, its only effect being the appointment of a new executor. The testator, by his will, only devised the estates he then had, *viz.* the *Clifton* and *Orchard* estates; and as the first and second codicils were attested by two witnesses only, they cannot be looked at; and the last has not even referred to the after-purchased estate, as it only related to the appointment of one executor in the room of another. All the authorities, from *Rolle's Abridgment* to *Pigott v. Waller*, as to what shall amount to a republication of a will, are collected by Mr. Serjeant *Williams*, in a note to *Dupper v. Mayo* (a). Although it was established by the cases of *Acherley v. Vernon*, *Barnes v. Crowe*, and *Pigott v. Waller*, that a codicil, duly executed, is a republication of a previous will; yet it does not follow, that after-acquired property passes by such codicil, unless such property be expressly referred to, or there be a clear intention on the

(a) 1 Wm. Saund. 277, 4th edit. (d), n. (4).

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part of the testator, that it should pass. This is evident from the case of *Bowes v. Bowes*, where the testator devised all his freehold and copyhold lands to trustees upon certain trusts, and afterwards purchased other lands, and then made a codicil, whereby, after reciting that he had devised all his freehold and copyhold lands to trustees, he revoked the same, so far as it related to two of the trustees named in his will, and devised his *suid* lands, &c. to the other trustees, upon the same trusts, and concluded, by declaring the codicil to be part of his will; it was held, that the codicil was not a republication of the will, so as to extend its operation to the real estate, purchased after the will was executed, but that it extended to the estates devised by the will, and no further. In *Parker v. Biscoe* (a), where the testator devised all his real estates, except certain copyholds therein mentioned, in trust for his eldest son, with remainders over, and afterwards made a codicil, reciting, that he had become entitled to certain estates on the death of his brother, and that he thereby revoked the limitation in his will, so far as it related to his estates in favour of his son: it was held, that such codicil did not amount to a republication of the will. It may now be laid down as an established proposition, that, where a codicil refers to and confirms a will, it operates as a republication of it; but, if there be no reference, it will not so operate, unless an intention to republish plainly appear. So, where the effect of a codicil is confined to the lands devised by the will to which it is annexed, it does not operate as a republication of such will, so as to pass after-purchased lands. Here, therefore, the intent of the testator to attract the will and previous codicils to the last, must be made out affirmatively by its contents, and not by the attestation only; and the mere circumstance of the testator's adding a third codicil, is not sufficient to shew that he

(a) 3 B. Moore, 24.

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intended to pass his after-acquired estate, as it does not confirm the will or either of the other codicils, nor does it even advert to them. In *Doe d. Pate v. Davy* (a), the testator, by his codicil, ratified and confirmed all and every the gifts, devises, and bequests in his will, except what he had altered by the codicil, and expressly directed that the codicil might be annexed to, and taken as part of his will, to all intents and purposes; and it was therefore most properly held to amount to a republication, so as to make after-purchased lands pass by the residuary devise. So, in *Acherley v. Vernon* the testator, after reciting in the codicil that he had made his will, added, "I hereby ratify and confirm my said will, except in the alterations after-mentioned;" and in *Barnes v. Crowe*, where there was an intermediate codicil, executed by two witnesses only, yet the testator by his last, which was duly attested, directed it to be accepted and taken as part of his will. So in *Pigott v. Waller*, the words the testator used in the last codicil, were—"a codicil made and published by me, and to be annexed to my will, and made part thereof, to all intents and purposes." Previously to the case of *Acherley v. Vernon*, there could be no republication of a will by implication; but now, if a codicil be duly attested, and refer in terms to the original will, so as to ratify and confirm it, it is sufficient; but a republication is not to be carried further than it was before the passing of the statute of frauds; and the mere attestation of a codicil, not referring to the original will, or to any intermediate testamentary papers, cannot have the effect of setting up such will. In *Rolle's Abridgment* (b) it is laid down, "that if a man, seised of lands, devise all his lands to J. S. and after purchase the manor of D., and after write in his will that J. D. shall be his executor, yet this is not any new publication to make the lands pass; but if, after the purchase of the manor of D., he deliver the first

(a) Cowp. 159.

(b) Vol. I, p. 618.

will as his will, and say that it shall be his will, without putting any words thereunto, yet this is a new publication to make the lands newly purchased to pass." That is particularly applicable to this case, as the last codicil merely substitutes one executor for another: and there is no reference whatever to the will or previous codicils; nor did the testator express that the last codicil should form part of his will. If, therefore, it had not been duly attested, it would have had the effect of removing the executor named in the second codicil, and appointing another in his stead; and although the latter was to have full power to act, it could only refer to his character of executor, and could by no possibility be taken to apply to lands purchased by the testator after the making of his will. As well, therefore, on principle and previous decisions, as that no intention of the testator is manifest that the after-acquired property should pass by the last codicil, his heir-at-law is entitled to take it.

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Mr. Serjeant *Pell*, in reply.—By the terms of the will, it is quite clear that the testator anticipated the purchase of other lands, as he devised all his real estate which he might die possessed of; and there can be no doubt of his intention that the last codicil should be a republication of his will; and although the *Allerton Hall* estate might not have passed under the will, yet he intended that the codicils should apply to it, as it was expressly mentioned in the first, and how it was to be disposed of. It is unnecessary to dispute the authorities of *Bowes v. Bowes* and *Parker v. Biscoe*, the rule being, that a codicil may so operate as to bring down the will to its own date, without any express reference to the will, or, as Lord Commissioner *Eyre* said in *Barnes v. Crowe*(a), "any thing that expressed the testa-

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tor's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute of frauds, re-execution of the will is not necessary; but nothing more is required than a writing, according to the provisions of the statute, expressing that intent." There, too, the passage in *Rolle's Abridgment* was pressed on the Court at the commencement of the argument, but not noticed by them. Here, the last codicil, being duly executed, although it do not refer to the property devised by the will, yet it not only attracts the will to it, but incorporates the intervening codicils, so as to render it one specific devise in point of law, and to refer to all the property the testator had at the time of making the last codicil. No question can arise as to annexation, as all were written on one sheet of paper; and the last codicil draws the will down to its own date, unless a contrary intent be shewn, which has not been even suggested in this case. Indeed, it is quite the reverse. Although it may be said that the trustees are distinct from the executors, yet the testator meant that they should be the same persons, and do the same acts. On these grounds, the third codicil operates as a republication of the will, and of the first and second codicils.

The following certificate was afterwards sent.

" We have heard this case argued by counsel, and considered it, and are of opinion, that the third codicil operated as a republication of the will and of the second codicil. Upon the question, whether it also operated as a republication of the first codicil, there may be some doubt; but as the republication of the will passes the *Allerton* estate on the same trusts as the first codicil, if properly executed, would have done, it is, perhaps, of little or no importance to consider that question further.

" We are of opinion that the legal fee in the *Allerton*

estate passed, by the will so republished, to *Nicholas Salisbury*, and *Abraham Garnett*, the devisees named in the will.

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Moody and Catherine his Wife v. King.

THIS cause came on to be heard before his Honor the Vice Chancellor, on demurrer, on the 12th *May*, 1824, when he directed the following case to be submitted to the Judges of this Court, for their opinion.

On the 4th *March*, 1802, *William Frost*, the younger, and *Catherine Moody*, the female plaintiff, intermarried.

*Catherine Moody* continued the wife of *William Frost*, till his death. *William Frost*, the elder, the father of *William Frost*, the younger, was, at the time of making his will, and continued thereafter, till the time of his death, seized in fee of the manor of *Brinkley*, otherwise *Brinkley Hall*, in the parishes of *Brinkley*, *Weston*, *Willingham* and *Carlton*, in the county of *Cambridge*, and of divers houses and lands in the same parishes.

On the 6th *April*, 1805, *William Frost*, the elder, made and published his last will and testament in writing, duly executed and attested to pass freehold estates, in the words following: "I, *William Frost*, give and bequeath to my son *William Frost*, and his heirs for ever, all my houses and lands, with all their appurtenances thereunto belonging; also I give to my well beloved wife, *Rebecca Frost*, the sum of 100*l.*, of good and lawful money, yearly, and every year, during her natural life, to be paid her by the aforesaid *William Frost*, half yearly, out of the estate; and if the said *William Frost* should have no children,

A testator being seized in fee, devised to his son *W. F.*, and his heirs for ever; all his houses and lands, charged with an annuity to the testator's wife for life, and if *W. F.* should have no children, child, or issue, the said estate, on the decease of *W. F.*, to become the property of the heir at law, subject to such legacies as *W. F.* may leave by will to any of the younger branches of the family. On the death of the testator, *W. F.* took possession of the lands devised, and died without issue, leaving his widow surviving, who afterwards intermarried with another:— Held, that she was entitled to dower out of the devised premises, but with

*a cessa executive* during existing outstanding terms to which they were subject.

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child or issue, the said estate is, on the decease of the said *William Frost*, to become the property of the heir at law, subject to such legacies, as he, the said *William Frost*, may leave by will to any of the younger branches of the family."

*William Frost*, the elder, did not revoke or alter his said will, and died on the 25th *August*, 1807, leaving *Rebecca*, his wife, since deceased, and *William Frost*, the younger, the devisee, him surviving; and upon the death of *William Frost*, the elder, *William Frost*, the younger, took possession of the manor, houses and lands so devised to him, and continued seised thereof, or of part thereof, and of land allotted to *William Frost*, the younger, by the commissioners, under an act of Parliament for inclosing the parish of *Brinkley*, in lieu of the remainder thereof, under the will, till his death. On, or about the 26th *October*, 1818, *William Frost*, the younger, died, and left *Catherine Moody*, his widow, and *Rebecca*, the wife of *Robert King*, his heiress at law, him surviving.

The manor, houses and lands, were subject to one or more long term or terms of years, created by *William Frost*, the elder, or some former owner thereof; which were, at the time of argument before the Vice Chancellor, vested in some person, in trust for the persons entitled to the inheritance.

After the death of *William Frost*, the younger, *Robert King*, and his wife, obtained a verdict in an action of ejectment, which they brought against *Catherine Moody*, then *Catherine Frost*, widow; and in *June*, 1820, they were put into possession of the said manor, and other hereditaments devised. In *Trinity Term*, 1 *Geo. 4*, *King* and his wife conveyed the estates by fine, to *Robert William King*, the defendant, in fee simple. The plaintiffs intermarried in 1821, and filed their bill in Chancery, for a discovery, and an account of the rents and profits of the estates, and to have dower assigned thereout, to *Catherine Moody*, as the widow of *William Frost*, the younger.

The question for the opinion of the Court was, whether the plaintiff, *Catherine Moody*, was entitled to dower, out of the estate which *William Frost*, the younger, took in the hereditaments mentioned in the will of his father, *William Frost*, the elder.

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The case came on for argument in the last Term, when Mr. Serjeant *Wilde*, for the plaintiffs, submitted, that *W. Frost*, the younger, took an estate in fee, under the will of his father, subject to an executory devise over; and the only question now is, whether his wife is entitled to dower out of that estate. The case of *Buckworth v. Thirkel* (a), is

(a) 3 Bos. & Pul. 652, n. The reporter was favoured with the following note of that case, by Mr. Justice *Burrough*.

#### BUCKWORTH v. THIRKEL.

THIS was an action of replevin. The defendant made cognizance, T.T. 1785. B.R. under *Solomon Hanford*, who claimed to be tenant by curtesy. A special case was reserved, stating a devise to *T. C.* and *E. P.*, their heirs and assigns, for ever: upon trust that they receive the rents, and apply the same to the use, maintenance and education, &c. of the testator's god-daughter, *Mary Barrs*, till she arrive at the age of twenty-one years, or be married; and from and after, &c., he gave and devised all, &c. unto the said *Mary Barrs*, her heirs and assigns for ever; but in case the said *Mary Barrs* should happen to die before she attained the age of twenty-one, and without issue, &c., then, from and after the decease of the said *Mary Barrs* without issue as aforesaid, he gave and devised all, &c. unto his grandson, *Walter Barrs*, and to his assigns for life, with divers remainders over. In March, 1781, *Mary Barrs* being then nineteen, intermarried with *Solomon Hanford*. In March, 1782, a child was born, which died, August 25th, 1782; and on the 28th, the mother died, under twenty-one, and without leaving issue. *Solomon Hanford*, the husband, after the marriage, and during the coverture, received the rents and profits of the premises.

This case was twice argued, first, in Easter Term last, by Mr. *Wood*, and Mr. *Whitechurch*; and now, by Mr. *Le Blanc*, and Mr. *Wilson*.

At the beginning of the second argument, it was stated, that, since the last argument, another fact was agreed to be added to the case: viz. "That *Walter Barrs*, the devisee over, was, and now is, the sole heir at law."

Mr. *Le Blanc*, for the plaintiff, now contended, that the wife should be seised of an indefeasible unqualified estate to entitle the husband to cur-

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precisely in point, where there was a devise in fee simple, with an executory devise over, and it was held, that the husband's

tesy. The words, "without leaving issue," mean issue living at the death of *Mary Barrs*. In the event of her dying before twenty-one, not leaving issue living at her death, it is not a limitation spent or expired naturally, but is defeated by a condition. On the former argument two cases were cited to support the distinction between estates expired and estates defeated. The first of them, *Payne v. Sammes*, (Goldsb. 81, 1 Lev. 167, 1 And. 184, 8 Co. 34). The principle I contend for, is laid down in both those cases. *Payne v. Sammes*, was a case, where a mother, seised, and having two daughters, covenanted to stand seised to the use of the eldest, *E.*, in tail, on condition that she should pay to her other daughter, within a year after the death of the mother, or within a year after the other daughter should come to the age of eighteen years, 300*l.* and if *E.* should fail in payment, or die without issue, before the payment, then to the use of the second in tail. The mother died; *E.* married, had issue, and afterwards died without issue, before the day of payment. There the Court held *E.*'s husband entitled to be tenant by curtesy, and said: for as to the condition of payment of the sum, the case is not determined, for she died without issue, before the day of payment, (i. e.) before the second daughter came of the age of eighteen years, and as to that there is no condition broken, &c. Here, if there were no limitation over, it would be a fee determinable on condition. The condition here is broken.

The case of *Boothby v. Vernon*, (9 Mod. 147), was also mentioned. Rules relative to dower and curtesy are analogous, as to seisin, (1 Ro. Abr. Tit. Dower, (F 1), 676, 1 Vent. 327, Co. Lit. ss. 52, 53). It is necessary that the issue should inherit as heirs to the wife, and the same estate the wife had. Here, this would not be so, for the heirs would have an absolute estate, the wife a conditional one. Before the statute *de donis*, estates tail were fee simple conditional. It was held before, that it became absolute on the birth of a child. Then it was said that the tenant was seised in fee simple absolutely for three purposes: first, to enable him to alien; secondly, to make it liable to forfeiture for treason or felony; thirdly, it descended to the issue of a second marriage and so it would make a husband of such issue tenant by the curtesy. Then he stated the statute *de donis*, and cited 2 Inst. 333, and 8 Co. 35 b, 36 a. This case stands as before the statute *de donis*; the reason why the husband is tenant by the curtesy in cases of tenant in fee simple absolute, and fee tail, answers their arguments, and shews there is no good sense, in the distinction between limitation in tail, and a condition in tail. Bro. Abr. 296, "Restate," pl. 71; Fitz. 339 b, "Foremedon," pl. 56; Plowd. 241. Here the estate never became absolute. Had *Mary Barrs* lived till twenty-one, it would have been absolute. In this case it was defeated by a condition.

right to courtesy attached on the first estate, and was not defeated by its determination. The doctrine there laid down

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*Mr. Wilson*, for the defendant.—I admit *Mary Barrs* took a fee simple, subject to be made an end of by an event which has happened. The sole question here is, if she was seized of a sufficient estate. Tenancy by the courtesy is by operation of law, wherein the issue may by possibility inherit. The husband in the wife's life was liable to the services. The husband's right was inchoate on the birth of a child, and becomes complete on the vesting of the subsequent estate, though the wife's estate be gone, and the executory devise defeated. The executory limitation over would have been void at the time of the statute *de donis*. To give effect to men's intentions, first in Chancery, then in law, these limitations have been permitted. It was never meant by the statute to deprive the estate of any of its known properties. The estate by courtesy is not necessarily part of the wife's estate. She may be tenant in tail; and there the estate arises out of the reversion. The case of dower is analogous to this. The reason in Ro. Ab. 676, is a false one; besides, the Judges were divided. As to the case in Goldsb. it seems from it, that if it had appeared that the condition had not been performed, they would have held the tenancy by the courtesy. The *dictum* in *Payne v. Sammes* was extra-judicial, and there seems to have been a difference taken, between a condition of which the heir was to take advantage by entry, which put an end to all mesne charges, and related to the creation of the estate, and a conditional limitation which related only to the defassance. Lord *Anderson* reasoning in another part of Goldsb. has an eye to the same idea; and see what he says also in 1 Lev. 169. The determination of the wife's estate is no answer to the claim of courtesy. The statute *de donis* has not taken it away, but the existence of it before, shews tenancy by courtesy in case of a conditional estate, at common law.

This case is a fee simple conditional, liable to the incidents, as the case of fee tail, before the statute. *Boothby v. Vernon* applies not, for the wife was never seized in possession of an estate of inheritance. The estate there was in the son by purchase. The same answer may be given to the case of joint tenants, for the first never had the inheritance; forfeiture for felony would not defeat the estate by courtesy. 29 Ed. 3, 27.

*Lord Mansfield*.—The right of a tenant by the courtesy, existed before the statute *de donis*. It was part of the common law. The definition necessary to entitle the husband, is, that the wife should be seized of an estate of inheritance, which, by possibility might descend to her issue, and that a child should be born. Estates of inheritance at the common law, were absolute or conditional. Tenancy by the courtesy went to both; and this, though the wife died without issue living, so as to let in the reverter. By a subtlety, and in odium of perpetuities, it was held,

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by Lord *Mansfield*, is not only well founded, but has never since been questioned.. The courtesy of the husband, and the dower of the wife, must be governed by the same principle; and applying it to the latter, it is, as his Lordship truly defined it, that the husband must be seised of an estate of inheritance, which, by possibility, his issue might inherit: and considering by whom the case of *Buckworth v. Thirkel*, was argued, and how the Court was constituted, it must be considered, not only as an authority, but decisive of the present question. The case of *Payne v. Sammes*(a), so much relied on for the plaintiff, in the argument in *Buckworth v. Thirkel*, is differently reported as to different points; and *Boothby v. Vernon* (b), does not decide the point for which it was cited. In *Payne's* case, as reported in *Coke*, it was resolved, that at common law,

- (a) Goldsb. 81; S. C. 1 Leon. 167; 8 Rep. 34; Anders. 184.  
 (b) 9 Mod. 147.

for a special purpose, that a tenant in tail might alien on the birth of issue.

At the common law, the only modification of estates expressly limited was by way of condition. The statute of uses introduced a greater latitude. There then arose a great dread of letting in perpetuities. About the time of Queen *Elizabeth*, and King *James 1st.*, many cases arose; contingent remainders were held to be destroyed before the remainder-man came *in esse*; the Court leaned against all contingencies over: having gone a great way, it was thought they had gone too far; then came new devices. During the troubles, the most eminent men in the profession were chamber counsel; then arose trustees to preserve contingent remainders and executory devises. It is not long since the boundaries of the last were settled: I remember when it was settled that an executory devise should be good on a devise for a life or lives in being, and twenty-one years after. Now here it is said, it is a conditional limitation. It is not so; it is a contingent limitation; if so, then it does not defeat the right; it is a limitation over, which defeats the estate on her death under twenty-one, and without issue. But during the time of her living, she was seised of a fee simple estate, and her issue would have taken. So the defendant is entitled to be tenant by the courtesy.

Judgment for the defendant.

if lands had been given to a woman, and the heirs of her body, and she had taken a husband and had issue, and the issue had died, and the wife had died without issue, whereby the inheritance of the land reverted to the donor, in that case the estate of the wife was determined, and yet the husband should be tenant by the courtesy, for that that was tacitly implied in the gift. In *Boothby v. Vernon* the inheritance never vested in the wife during her life, and therefore her husband could not be tenant by the courtesy. Although the case of *Buckworth v. Thirkel* was reviewed by Mr. Butler (a), who says, "the ground upon which the Court appears to have formed their opinion, is an analogy they supposed it to bear to the case of estates in fee simple conditional, and estates tail; in both of which dower and courtesy continue after failure of the issues; yet it seemed singular that the Court there should prefer reasoning by way of analogy from the only admitted exception to the general rule, dower and courtesy, in all other cases of conditions, being defeated by the entry for the condition broken, to reasoning by analogy from the general rule itself: it is the more singular, as the general case of estates on condition approached nearer to the case then under the consideration of the Court, than the particular case of estates in fee simple conditional, or estates tail; for the distinguishing feature of the devise which gave rise to the case before the Court (as of all devises of that description) is, that after the whole fee is first devised, it is made defeasible by a subsequent clause. That the difference between the case of an estate in fee simple, made defeasible by a subsequent executory limitation or devise, and that of an estate in fee simple conditional, or an estate tail, is, that an estate in fee simple, made defeasible by an executory limitation or devise, cannot, by any means whatever, be

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(a) Hargrave and Butler's notes to Co. Lit. 241, (n. 170.)

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discharged by the first taker or devises, from the operation of the subsequent limitation or devise; but an estate in fee simple conditional may, immediately after the birth of a child, and an estate tail immediately after the marriage, be destroyed, and a fee simple absolute acquired by the husband and wife joining in a fine or common recovery, and that the case is the same with respect to the wife's right of dower;" yet that does not materially vary the rights of the parties, and may, therefore, be considered as a mere technical objection. Although, in *Summer v. Partridge* (a), the Court said, it was a rule in the case of a tenancy by the courtesy as well as in a tenancy in dower, that the estate shall come out of the inheritance, and not out of the freehold; yet that case is not to be found in the Register's book, nor was it adverted to in *Buckwoorth v. Thirkel*, although it was decided nearly fifty years previously. A right to dower is not to be destroyed by the mere introduction of an executory devise; which, as Lord Mansfield says, is not a conditional, but contingent, limitation. In *Fitzherbert's Natura Brevia* (b), it is said, "if rent be granted to *J. S.* and his heirs, on condition, that if the grantee or his heirs die, his heir within age, the rent shall cease during the non-age, &c., the feme shall recover dower of the rent against the ter-tenant, but *cessat executio* during the non-age. In *Flavill v. Ventrice* (c), where *A.*, seised in fee of lands, covenanted to stand seised thereof to the use of himself and his heirs, till *C.*, his middle son, took a wife, and after to the use of *C.* and his heirs, and afterwards *A.* died, by which it descended to *B.*, the elder son of *A.*, who had a wife, and died, and afterwards *C.* took a wife, it seemed that the wife of *B.*, the elder son, should not be endowed of the estate of her husband, be-

(a) 2 Atk. 47.

(b) Tit. "Writ of Admeasure-  
ment of Dower," 149, G (a).

(c) Rolle's Abr. Vol. 1, 676, tit.

"Dower," (F).

cause his estate was ended by an express limitation; and therefore the estate of the wife, being derived out of it, cannot continue longer than the original estate; yet there the Court was divided in opinion, and, as was truly said in the argument in *Buckwoorth v. Thirkel*, the reason given by *Rolle*, that dower must be derived out of the husband's estate, is clearly a bad one. The principle laid down in *Buckwoorth v. Thirkel*, has been confirmed by *Goodenough v. Goodenough* (a), where it was held, that a woman will be dowable of a fee determined by executory devise or shifting use, and which must govern this case.

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Mr. Serjeant Crees, contra.—The plaintiff's wife claims her dower out of the estate of another, and not out of that of her deceased husband, and it was only out of his estate that she could be dowable. The plaintiff rest their case entirely on the decision in *Buckwoorth v. Thirkel*, over which the Court has an appellate jurisdiction, and its authority has been since questioned, and particularly by Mr. Butler in his note to *Coke Littleton*. Besides, there is a wide distinction between dower and curtesy; and on *Buckwoorth v. Thirkel* being referred to in *Doe d. Andrew v. Hutton*, Lord *Alvanley* said (b), “it occasioned some noise in the profession at the time it was decided; and the doctrine there laid down is very fully commented upon in the notes to *Hargrave* and *Butler's Co. Lit.* fol. 241 a. It is there stated, as the result of various authorities, that, with respect to limited fees, where the fee in its original creation is only to continue to a certain period, the wife is to hold her dower, and the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that where the fee is originally devised in words, importing a fee simple, or fee tail

(a) 2 Dickens. 795; S. C. Preston on Abstracts, Vol. 3, 372.

(b) 3 Bos. & Pull. 663.

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absolute or unconditional, but by subsequent words is made determinable upon some particular event, there, if that particular event happen, the wife's dower and the husband's courtesy cease with the estate to which it is annexed." "It is not necessary for me" (continued his Lordship) "to enter into an examination of the several cases referred to in this note. The observations there made are certainly worthy of attention; but we do not feel ourselves here bound to enter into the questions respecting courtesy and dower, or to give any opinion upon the case decided in the *King's Bench*, from which we are all of opinion that the present case is very distinguishable." And although Mr. Preston in his *Essay on Abstracts of Title*, refers to *Goodenough v. Goodenough*, to shew that a woman may be dowable of a fee, determined by an executory devise; yet, he states that the point is doubted in practice. The Court, therefore, will consider the clear and perspicuous reasoning of Mr. Butler, which is supported by the authorities to which he referred, and if the Vice Chancellor had considered *Buckworth v. Thirkel* as an authority, he would not have directed this case to be sent here. Although the testator by his will gave an estate absolutely, and in fee, to his son, yet he annexed a condition, by which that fee was to be determined, *viz.* that if he should die without issue, the estate was to become the property of the heir at law; and as he died without issue, the fee determined; and, therefore, there was an end of the estate on which the claim to dower would attach.

[Mr. Justice Park.—If the devisor's son had died leaving his wife *enciente*, the fee would have remained until the birth of the child.]

[Lord Chief Justice Best.—Suppose an estate tail to *A.*, remainder to *B.* in tail, and *A.* had no issue; *B.* takes an estate of inheritance, and yet it would be subject to dower for the widow of *A.*]

That is the only exception to the general rule, and

arises from the equitable construction of the statute *de donis*, but, in all the cases depending on the rules of the common law, it is clear that the dower of the wife will determine or be defeated with the determination of the estate, or by avoidance of the title of her husband, and therefore where the husband has a defeasible interest either by force of a condition, or by reason of a defective title, the determination of the estate of the husband will defeat the dower of the wife. Here the quantity and quality of the estate which *Frost*, the younger, took, must be looked at, and as it was made determinable on a particular event, as soon as that event happened, the right to dower ceased; and in order to entitle his widow to claim it, her husband should have had the whole of the freehold and inheritance, *simul et semel*, under a legal estate. The estate devised is a new species of inheritance, not known to the common law, and dower cannot be extendible to it. This, therefore, is altogether distinguishable from the case of a tenant in tail, who has an indefeasible power to make the estate his own, by levying a fine or suffering a recovery, but here the devisee had no such power, nor could he execute any instrument to operate on the estate, as it was given over, in case he died without issue, by the act of the donor. Although dower were formerly favored, yet it was then the only mode by which a provision could be made for a married woman; but times and circumstances have since changed, and in *Ray v. Pung*(a), where lands were conveyed by *A.* to such uses as *B.* should by deed appoint, and in default of, and until, appointment, to the use of *B.* in fee, and *B.* afterwards, in execution of the power, by deed, duly made an appointment of the lands in favour of *C.* in fee, and *C.*, at the time of making the appointment, was married; it was held that his wife was not dowable out of these lands; and although *Buckworth v. Thirkel*, was cited, it was

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observed, that the question there was, whether the husband were entitled to courtesy, which is different from a question as to dower. Here it would be inconsistent with the intent of the devisor, that the estate should be chargeable with dower, as he subjected it to such legacies as his son, the devisee, might leave to any of the younger branches of the family, and he might have charged the estate to its full value; and it is quite clear, that a claim to dower cannot over-ride such legacies, nor be claimed out of the estate, when the inheritance of the husband no longer existed. At all events, as the estate was chargeable with an outstanding term, there must be a *cesset executio* until that term be satisfied, even supposing that the plaintiff's wife can be considered as entitled to dower.

Mr. Serjeant *Wilde* in reply.—The husband was seised of an estate of inheritance at the time of his death, which his children might have inherited after him. It has been said, however, that this is in the nature of an executory devise, and therefore that the widow of the devisee is not entitled to dower. Although it has been urged that the authority of *Buckwoorth v. Thirkel* has been frequently questioned, yet it was recognized by Mr. Justice *Hollroyd* in *Doe d. Pratt v. Timins* (a), and treated as an existing authority. Though a distinction has been taken between the estate created in this case, and an estate tail, as a tenant in tail may acquire an absolute fee; yet, it is no reason why the wife should not be entitled to dower, which attached the moment her husband became seised of the inheritance, and he was not only seised of the estate in fee, but his issue might have inherited after him; and if so, this is analogous to an estate tail, as far as regards the right of the wife to dower. The case of *Ray v. Pung*, merely decided that the right to dower is defeated by the execution of a power, on the ground that where the set-

tlor makes an appointment, a new use springs up, and vests in the appointee, and the fee originally limited to the settlor will cease, and with it the right of the wife to her dower, in respect of such fee, will be defeated also. Here, however, all the legal incidents of dower exist, and although there be an outstanding term or terms, it is no answer to the plaintiff's claim, as it can only affect the execution.

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" King.

**Lord Chief Justice BEST.**—As Lord *Alvanley* in *Doe v. Hutton* expressed some doubt as to the authority of *Buckworth v. Thirkel*, I shall pause before we certify our opinion to the Vice Chancellor; but my present impression is, that the decision in that case is not only good law, but founded on good sense. Lord *Mansfield* there drew a distinction between estates by condition, and conditional limitations. Here, the husband had an estate of inheritance which could not have been defeated until nine months after his death, and, if he had left a child surviving, such child must have inherited the estate in fee simple indefeasible, in which case the executory devise would be at an end. This, therefore, bears a strong analogy to the case of an estate tail; and the wife is not to be restricted from dower, from the mere circumstance that a tenant in tail may convert the estate into a fee simple.

The following certificate was afterwards sent to the Vice Chancellor:

We have heard this case argued by counsel, and are of opinion that the plaintiff, *Catherine Moody*, is, at law, entitled to dower out of the estate which the said *Wm. Frost*, the younger, took, in the hereditaments mentioned, under the said will of his father *Wm. Frost*, the elder, with a *cesset executio* during the term or terms.

W. D. BEST,  
J. A. PARK,  
J. BURROUGH,  
S. GASHEL.

1825.

*Wednesday,  
April 20th.*

The Court allowed the defendant, in a writ of *formedon*, to withdraw a demur-  
rer, and reply, on payment of  
costs, on an affi-  
davit which  
stated that his  
title had but  
recently accrued  
to him.

**CHOLMELEY v. PAXTON and Another.**

THIS was a writ of *formedon*, in which the question was as to the construction of a power in a will, which was set up by the defendants in their plea. To this plea the defendant demurred, as the whole of the power was not recited therein; and, in the last Term, a rule *nisi* was obtained by Mr. Serjeant *Cross*, to withdraw the demurrer and reply, on payment of costs, by the defendant; and he cited the cases of *Scott v. Perry* (*a*), where *in formedon*, there being a mistake in setting out the estate tail in the writ, the plaintiff had leave to amend all his proceedings on paying costs, and costs of an ejectment; in *Blackamore's* case (*b*), the original writ was allowed to be amended; and in *Tur-  
ner v. Palmer* (*c*), a writ of *quare impedit* was amended on account of a misprision or mistake by the clerk.

Mr. Serjeant *Bosanquet* and Mr. Serjeant *Peake*, on shewing cause, relied on the case of *Hall v. Blake* (*d*), where this Court refused to allow a writ of *entry sur disseisin en le post* to be amended, by altering the name of the disseisor; and they insisted, that, at all events, it was necessary for the defendant to shew, by affidavit, the special grounds on which his application rested, especially as the proceedings *in formedon* are in the nature of a real action. In *Dumsday v. Hughes* (*e*), the Court would not give leave to amend a count in a writ of right, unless a favourable case were made out by the defendant by affidavit; and in *Charlwood v. Morgan* (*f*), the Court refused to allow the defendant to amend the mistake of a Christian name in the count, although an affidavit, accounting for the mistake, was produced.

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|--|---------------------------------|
| ( <i>a</i> ) 3 Wils. 206. S. C. 2 Sir W.<br>Bl. 758. | ( <i>d</i> ) 4 Taunt. 572.      |
| ( <i>b</i> ) 8 Rep. 159.                             | ( <i>e</i> ) 3 Bos. & Pul. 453. |
| ( <i>c</i> ) Cro. Car. 74.                           | ( <i>f</i> ) 1 New Rep. 64.     |

The Court having ordered an affidavit to be prepared, one was accordingly produced on the last day of the Term, in which the defendant's title was set out from the year 1783; and it was sworn, (among other things), that his right only accrued to him in 1822, when he became tenant in tail on the death of the party last seized, and who took under the will of the first purchaser. The affidavit also recited the power at length.

*Cur. adv. vult.*

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CHOLMELEY  
S.  
PAXTON.

Lord Chief Justice *BEST* now said—We never doubted our authority to amend in writs of right, although there might have been delay on the part of the defendant, or his title rested on a dormant claim; but here it is sworn that the defendant's title only accrued to him in 1822. He may, therefore, be allowed to withdraw the demurrer, and reply, on payment of costs.

Rule absolute.

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#### ROWLEY v. HORNE.

Thursday,  
April 21st.

THIS was an action of *assumpsit* against a coach proprietor for not delivering a parcel containing bank notes, which had been entrusted to him by the plaintiff, to be forwarded by his coach.

At the trial, before Mr. Baron *Garrow*, at the last Assizes at *Stafford*, it appeared that the plaintiff, a farmer, living in *Shropshire*, sent, on the 28th *December* last, a parcel, containing bank notes to the amount of 31*l.*, being the amount of half a year's board and education for his daughter, who was at school near *Brompton*, to the defendant's coach-office at *Chester*, and paid for its carriage to *London*. In order to exonerate himself from his liability, the defendant proved that he had, by a general notice, declared that he would not be responsible for parcels

In an action against a coach proprietor for the loss of a parcel, in order to fix the plaintiff with the knowledge of a general notice, by which the defendant limited his responsibility, for parcels entrusted to him, to 5*l.*, unless entered and paid for accordingly, it was proved that the plaintiff had, for three years, taken in a newspaper in which the notice was advertised every week; and the Jury having found a verdict for the plaintiff, the Court refused to grant a new trial.

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above the value of £7. unless entered and paid for accordingly, which the plaintiff had not done; and in order to bring home the knowledge of this notice to the plaintiff, it was proved, that he had frequently had parcels conveyed by the defendant's coach, and that he had also been in the habit of taking in, for several years, a weekly newspaper, called the *Chester Chronicle*, in which, for the last three years, an advertisement had been constantly inserted by the defendant containing the above notice.

The learned Baron left it to the Jury to say, whether the fact of the plaintiff's taking in the newspaper which contained the advertisement, were a sufficient notice to him of the terms within which the defendant's responsibility was limited. They found a verdict for the plaintiff to the amount of the notes lost.

Mr. Serjeant *Vaughan* now applied for a rule *nisi* that this verdict might be set aside, and a new trial granted, submitting, that as the plaintiff had frequently sent parcels by the defendant's coach, he must have known the terms on which they had been conveyed, and that, having for so long a period taken in the newspaper containing the defendant's notice of the limitation of his responsibility, it must, at all events, be presumed that he had seen, and was well aware of the existence of the advertisement in question.

Lord Chief Justice **BEST**.—Surely it cannot be presumed, because a person is in the habit of taking in a newspaper, that he reads all the advertisements in it. The rule of common law has been, by this species of notice, much altered and encroached on. Difficulties, like the present, may be easily remedied by coach-proprietors ordering their servants, who receive parcels, to give the parties bringing them a printed paper, containing the condi-

tions they attach to the carriage of such parcels. It is clear, that, unless they do this, they cannot get rid of the liability imposed on them by the common law. The public must not suffer from the neglect of carriers, or the dishonesty of their servants. There can be no doubt but that this question was properly left to the Jury: their conclusion was correct; and there is no reason for disturbing the verdict.

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" Horne.

Rule refused.

**Trusses, Administratrix of Triggs, v. NEWNHAM.**

Thursday,  
April 21st.

THIS was an action on a bill of exchange, for 39*l.* 16*s.*, drawn by the intestate, (the plaintiff's late husband,) a publican in *Sussex*, in the year 1815, upon the defendant, who accepted it, payable at *C. B. Cockerell's*, No. 11, *Nassau Street, Soho*. The defendant pleaded the 'statute of limitations.

Presentment of  
a bill of ex-  
change, at the  
house of a trad-  
er, or merchant,  
between eight  
and nine in the  
evening:—  
Held, sufficient.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, it appeared that the bill was presented at *Nassau Street* for payment, by a notary, between eight and nine o'clock in the evening of the day on which it became due; and the plaintiff gave in evidence a letter written by the defendant, dated the 17th *February*, 1821, acknowledging his liability; and that he subsequently promised to pay the amount of the bill. The Jury found a verdict for the plaintiff.

Mr. Serjeant *Taddy*, now applied for a rule *nisi*, that this verdict might be set aside, and a new trial granted, and submitted, that the bill should have been presented for payment within the usual hours of business, and that between eight and nine in the evening was, at all events,

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too late. In *Parker v. Gordon* (a), the drawee accepted a bill, payable at his banker's, who shut up at six o'clock in the evening, and the bill was not presented for payment until after that hour, when the shop was shut up, and the clerks gone: in an action against the drawer, it was held, that this was not a good presentment. In *Elford v. Teed* (b), it was held, that a presentment of a bill, at a banking-house, after banking hours, when the house is shut, *viz.* between half-past six and seven in the evening, is not a sufficient presentment to charge the drawer. And in *Callaghan v. Aylett* (c), it was decided, that if a bill be accepted, payable at a banker's, the neglect to present it there is equally a discharge to the acceptor as to the drawer. In *Elford v. Teed*, Lord *Ellenborough* said, "there is not any text-writer, upon whose authority, a presentment of a bill, by a notary, at a house of business, after it was closed, could be sustained. It is laid down, in *Marius* (d), that it must be made during times of business, at such seasonable hours as a man is bound to attend, by analogy to the *horæ juridicæ* of the courts of justice."

Lord Chief Justice *BEST*.—In *Parker v. Gordon*, and *Elford v. Teed*, the bills were accepted payable at a banker's, who begin and leave off business at stated hours, and it was held that the presentment, in such cases, must be made within the limited and usual banking hours; for that, if a party took an acceptance, payable at a banker's, he bound himself to present the bill during the banking hours. For the convenience of bankers, and in order to provide for the clearances, it is necessary for them to close at five or six o'clock. In *Lefiley v. Mills* (e), Lord *Kenyon* thought

(a) 7 East, 385.

(b) 1 Mau. & Selw. 28.

(c) 3 Taunt. 397.

(d) 2d edit. 187.

(e) 4 Term Rep. 171.

that the acceptor of a bill had till the last moment of the day of grace, to pay the bill; and Mr. Justice *Buller* thought it was payable any time upon the last day of grace, upon demand, so as such demand was made within reasonable hours; and here the demand was made at the house of a private individual. The case of *Barclay v. Bayley* (*a*), appears to be precisely in point, where Lord *Ellenborough* held, that the presentment of a bill for payment, at the house of a merchant residing in *London*, at eight o'clock in the evening of the day it becomes due, was sufficient to charge the drawer; and, if sufficient to charge him, of course it is so as against the acceptor: and his Lordship there said, "a common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the presentment had been during the hours of rest, it would have been altogether unavailing; but eight in the evening cannot be considered an unseasonable hour for demanding payment, at the house of a private merchant, who has accepted a bill."

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The rest of the Court concurring—

Rule refused (*b*).

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|---|---|
| ( <i>a</i> ) 2 Campb. 527.  | 6 East, 3. <i>Morgan v. Davison</i> , 1 |
| ( <i>b</i> ) See <i>Bayley</i> on Bills, 4th edit. 180. <i>Darbyshire v. Parker</i> , | Stark. Rep. 114.                        |

KING, Demandant; SHEPHERD, Tenant; GERMAIN, Vouchee.

MR. Serjeant *Bosanquet* moved that this recovery might be amended, by inserting the words "of the advowson," before the words, "of the vicarage." The property was

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In a recovery, the property was described as a "moiety of the vicarage, &c.," and in the deed to lead the uses, as a "moiety of the advowson of the vicarage, &c." the Court allowed the recovery to be amended, by inserting the words, "of the advowson," before "of the vicarage;" and the deed to lead the uses having been lost, the Secondary read the description of the premises from the enrolment of such deed.

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KING,  
Demandant;  
SHEPHERD,  
Tenant;  
GERMAIN,  
Vouchee.

described in the recovery as "a moiety of the vicarage," and in the deed to lead the uses, as "a moiety of the advowson of the vicarage, &c." The learned Serjeant produced an affidavit, which stated that a similar amendment had been allowed as to the other moiety a few years since, and that the original deeds had been then produced, but that they were since either lost or mislaid.

The Secondary read the enrolment of the deed to lead the uses, in which the premises were described as the "moiety of the advowson of the vicarage."

*Fiat.*

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Friday,  
April 22nd.

TENNY, on the several demises of HENRY GIBBS, CHARLES GIBBS, GEORGE GUNNING, ROBERT GUNNING, and WILLIAM GUNNING, v. MOODY.

In ejectment, to recover premises for nonpayment of rent,—a variance between the amount of rent stated in the particulars of demand of the lessors of the plaintiff, and the amount proved at the trial to be due,—held to be immaterial.

A. C. devised lands to her niece, (*a femme covert*) for life, and her issue, remainder over, and appointed two trustees to receive the rents, and keep

the premises in repair, and gave them power to distrain, and grant leases for a limited period; and by a codicil she revoked the devise in the will, the trustees therein named having died, and devised the lands, in the same manner, to three other trustees named in the codicil:—Held, that the legal estate in such land vested in the new trustees.

THIS was an action of ejectment, and brought to recover possession of two-fourths of a mill, and certain other premises, upon a forfeiture of a term in them, by non-payment of rent, according to the condition of a lease, under which they were demised to the defendant by one *Ann Callant*, who was entitled to two-fourths, and *Henry Gibbs* and *Charles Gibbs*, who were entitled to one-fourth each.

At the trial, before Lord Chief Baron *Alexander*, at the last Assizes at *Maidstone*, it appeared, that, in their particulars of demand, the lessors of the plaintiff claimed for seven quarters' rent in arrear at *Michaelmas* last; but it was proved that only six were due, and that the title of three of the lessors of the plaintiff (*viz.* the *Gunnings*) was founded on the will of *Ann Callant*, who had died since the execution of the lease to the defendant, and under whose will they claimed,

as trustee. The will bore date the 15th December, 1809, by which *Ann Callant*, spinster, gave and devised, (amongst other things), her moiety, or half part, of and in the paper-mill, with the appurtenances, at *Hawley*, in the parish of *Sutton-at-Hone*, in the county of *Kent*, then in the occupation of *James Robson*, his assigns, or under-tenants, unto her niece, *Amelia Brooke Westcott*, otherwise *Amelia Brooke de Varreux*, wife, or reputed wife, of *Jean Baptiste Charles Count Toulre de Varreux*, formerly of the kingdom of *France*, but then a *French* emigrant, residing in *Upper Norton Street* in *Middlesex*, for life, (subject to the directions hereinafter mentioned and declared concerning the same estates and premises, and the rents and repairs thereof, and other matters relating thereto), and immediately after the decease of her said niece, to the use of her children in tail, remainder to her nephew, with divers remainders over. And the testatrix declared that, notwithstanding she had given and limited the said estates to her said niece and her children, and to her nephew, upon the contingencies therein mentioned, yet, to the intent and purpose that she or he should not be entitled to receive, of and from the several tenants, the rents thereof, nor that any neglect of needful and proper repairs might happen, the testatrix did thereby nominate and appoint *George Gunning* and *George Hicks*, and the survivor of them, his executors or administrators, receivers of the rents of the said estates, with full power to make distresses on non-payment thereof, and she desired and directed, that thereby and thereout they should keep the same, and every part thereof, in good and tenantable repair and condition; and that, after the discharge of that and of every other necessary outgoing, they should pay the clear or net rents and profits to her said niece during her life, for her own sole and separate use, independent of the said *Count de Varreux*, or any future husband, and free from his control, and all his debts and undertakings whatsoever, and for which

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rents and profits her receipts should be a sufficient discharge to the said receivers or trustees. The will also contained a power to the trustees to grant leases for any term not exceeding fourteen years. The testatrix afterwards made a codicil dated the 7th *February*, 1821, reciting the before-mentioned will; that the said *George Gunning* and *George Hicks*, had both died, and that the testatrix was desirous of appointing the three sons of her late friend *George Gunning*, namely, *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, (three of the lessors of the plaintiff), to be trustees and executors of her said last will and testament. And the testatrix thereby revoked and made void all and singular the devises and bequests in her said will contained, of all her real and personal estates, and every part thereof, to the said *George Gunning* and *George Hicks*, upon and for certain trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and directions therein expressed and declared, of and concerning the same; and, in lieu thereof, she gave, devised, and bequeathed all and singular the real and personal estates, goods, chattels, rights, and credits, and every part and parcel thereof, unto the said *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, their heirs, executors, administrators, and assigns, according to the nature of the respective estates, upon and for the several and respective trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisions, conditions, and directions, in the said will and testament expressed and declared, of and concerning the same estates and premises respectively, in the same manner in all respects as if the said *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, had all of them been originally named as trustees and executors of the said last will, instead of the said *George Gunning* and *George Hicks*, deceased; and the testatrix thereby nominated, constituted, and appointed the said *George Gunning* (the son),

*Robert Gunning*, and *William Gunning*, to be the executors of her said last will and testament.

The will, with the codicil, was proved in the *Prerogative Court at Canterbury*, on the 3rd December, 1821, by the three executors named in the codicil.

The Jury having found a verdict for the lessors of the plaintiff—

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Mr. Sergeant *Taddy* now applied for a rule *nisi*, that it might be set aside, and a nonsuit entered, or a new trial granted; and submitted, *first*, that the variance between the amount of the rent claimed to be due in the particulars, and that proved to be actually owing at the trial, was fatal. That the action being founded on a forfeiture, for the non-payment of rent, the exact amount of rent due should have been demanded, and stated in the particulars with precision and accuracy. That the present mode of proceeding by ejectment, having superseded that of the common law, wherein the utmost nicety was required, should be confined within the same rules; particularly as the defendant, had the sum claimed been that which was really due, might have brought the money into Court, under the statute 4 Geo. 2, c. 28, s. 4(a): whereas, in this case, the demand being too large, he might have found difficulty in availing himself of it; and the rent can only be calculated to the last rent-day. *Doe d. Harcourt v. Roe (b).* Secondly, that *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, three of the lessors of the plaintiff, and the trustees and executors named

(a) By which it is provided,  
"That if the tenant, or his assignee  
or assignees shall, at any time be-  
fore the trial in ejectment, pay, or  
tender, to the lessor, or landlord,  
his executors, &c. or pay into

Court, where the cause is depend-  
ing, all the rent and arrears, to-  
gether with the costs, all further  
proceedings on the ejectment shall  
cease, and be discontinued."

(b) 4 Taunt. 883.

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in the codicil, could not maintain this action, as the legal estate did not vest in them, but in the niece of the testatrix, to whom the lands were devised, for her life, with remainder to her issue in tail. Although, in *Shapland v. Smith* (*a*), where lands were devised to trustees, upon trust that they should, every year, after deducting rates, taxes, repairs, and expences, pay such clear sum as should remain to *A. B.*,—Lord *Thurlow* held, that the trustees being to pay the taxes and repairs, must have an interest in the premises; and, therefore, that the legal estate was vested in them; yet here no such estate was vested in the two trustees named in the will, and those appointed by the codicil were invested with no new powers, as the testatrix directed them to take on the same trusts, and subject to the same provisions, and in the same manner, in all respects, as if they had been originally named as trustees and executors in the will. And although they were authorised to receive the rents, distrain for the arrears, keep the premises in repair, and grant leases for a limited term, yet that is inconsistent with their taking a legal estate; as, if such estate vested in them, they would have full power to distrain without any such provision, and might grant leases for lives or other terms, without being restrained to fourteen years. Besides, they were directed, after discharging the costs of the repairs, to pay over the clear rents and profits to the niece of the testatrix, for her own separate use; and it was therefore unnecessary that they should have been invested with the legal estate. In *Doe d. Leicester v. Biggs* (*b*), where the testator devised land in trust to pay unto, or else to permit and suffer his niece to receive the rents, it was held that the legal estate was executed in the niece; and no case can be found, wherein trustees, if they have nothing assigned to them to do but to receive and pay over rents, have been held to take the legal es-

(*a*) 1 Brown's Chan. Cas. 75.

(*b*) 2 Taunt. 109.

tate. In *Shopland v. Smith*, Mr. Baron *Eyre* held, that there is no difference between a devise to trustees "to permit A. to receive," or, "to pay profits to" him; as it amounts to a disposition of the land. Here, therefore, the use was executed, and the legal estate vested in the nieces of the testatrix, as the party beneficially interested under the will.

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**Lord Chief Justice Best.**—It does not appear to me that either of the objections raised against this verdict rests on any substantial foundation. The first is, that seven quarters' rent were claimed as due, by the lessors of the plaintiff, in their particulars, and that six only were proved to have been actually in arrear; and it has been insisted that the variance is fatal, this being in the nature of a proceeding as in the case of a forfeiture at common law, according to which a precise demand of the rent actually due was a necessary preliminary to the forfeiture. It does not, however, follow that even at common law the strictness necessary in the demand must extend to or affect the particulars, so as to vitiate them for a mere variance between the amount of the rent demanded, and that proved to be due. By the statute 4 Geo. 2, c. 28, which was passed with a view, (among other purposes), to obviate the inconveniences attending re-entries at common law for non-payment of rent in arrear, it was enacted, by the second section, "that in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand, or re-entry, serve a declaration in ejectment for the recovery of the demised premises," &c. If, therefore, no formal demand be necessary since the statute, the plaintiff's case cannot be affected by a mistake as to the amount claimed by the particulars, provided half a year's rent were

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in arrear. It would be highly impolitic and dangerous to put too strict a construction on particulars, as they are frequently open to great abuse; and here it was proved, that six quarters' rent were in arrear.

*Secondly*, it has been insisted that three of the lessors of the plaintiff, *viz.* the trustees named and appointed in and by the codicil to the will of *Ann Callant*, have no legal title, so as to enable them to maintain this action; but that they are mere trustees or receivers for the niece of the testatrix, and her children, in whom the legal estate and beneficial interest are vested. Whatever doubt might have arisen as to the construction of the will, is completely removed by the terms of the codicil, which enables us to put such a construction on the will, as to vest the legal estate in the trustees. The words of the codicil are: "I give, devise, and bequeath all and singular my real and personal estates, goods, chattels, rights, and credits, and every part and parcel thereof, unto *George Gunning*, *Robert Gunning*, and *William Gunning*, their heirs, executors, administrators, and assigns, according to the nature of the respective estates, and upon the same trusts as expressed in the will." These words give them the legal estate. Is, then, the estate transferred to the *cestui que trust*, under the statute of uses? In *Doe d. Leicester v. Biggs*, the legal estate was held to be executed in the devisee, or *cestui que trust*, because, the words 'to permit and suffer,' in the will, came last; for it is a general rule, that, if there be a repugnancy, the first words in a deed, and the last words in a will, must prevail: and Sir *James Mansfield* there said, "for want of a better reason, we are forced to say, that we think the will gives the legal estate to the party beneficially interested." There, too, the trustees were only to pay to the testator's niece, or to suffer her to receive and take the rents, there being in fact nothing to be done by the trustees. Here, however, they were authorised not only to receive the rents, but to distrain for

arrears, to keep the premises in repair, and to make leases; I am, therefore, clearly of opinion, that they must be considered as having a legal estate vested in them. And although a moiety of the estate were devised by the testatrix to her niece, for life, and to her children after her death, yet she was not to be entitled to receive the rents, or to distrain for them, in case of their being in arrear; and the trustees were expressly directed to keep the premises in repair, out of the monies received by them from the rents; and, after discharging all outgoings, to pay over the net rents and profits to the niece. On these grounds, there can be no doubt, but that the legal estate was vested in them, and that they were, consequently, entitled to recover.

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Mr. Justice PARK.—The great nicety and exactness required by the common law in making a demand of rent, with a view to forfeiture, was one of the reasons which induced the Legislature to pass the statute 4 Geo. 2. A bill of particulars, even under a Judge's order, does not require so strict a construction as has been now contended for; and it would be most dangerous to tie down parties to their precise terms, as they are frequently open to abuse. Although the statute requires half a year's rent to be in arrear, the lessors of the plaintiff brought themselves within it, as they proved that six quarters were due to them from the defendant; but it does not follow that they must be confined to that amount in their particulars. My Lord Chief Justice has so fully and satisfactorily answered the second objection, that it is quite unnecessary for me to add another observation.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—I very much question whether the trustees did not take the legal estate under the will; for if it appear, or can be collected from the whole of that

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instrument, that the testatrix intended that they should do so, any particular words of devise are unnecessary. But the codicil removes all doubt. This case is distinguishable from that of *Doe d. Leicester v. Biggs*, as, here, the testatrix has directed the net rents and profits, after discharging the expences for repairs, to be paid to her niece; whereas, there, the trustees were to pay unto, or *permit and suffer* the niece to have and take the rents; and it was held, that as the *last* words in the will were *permit and suffer*, they gave the *cestui que trust* a legal estate. There is another material distinction to be drawn between these two cases. In *Doe d. Leicester v. Biggs*, the trustees had nothing to do but to pay the money to the devisee, or permit her to receive the rents. Here, however, they were not only empowered to distrain for rent in arrear, but to lay out part of the rents received by them in keeping the premises in repair; and, therefore, they took the legal estate. In *Silvester d. Law v. Wilson* (a), which was decided after *Shapland v. Smith*, where a person devised lands to trustees, in trust to take and receive the rents and profits thereof, and to apply the same for the subsistence and maintenance of his son, during his life, it was determined that it was not an use executed in the son, but that he had only a trust. And Mr. Justice *Ashurst* there said, "the trustees were not barely to receive and pay, but the testator directs that such rents, issues and profits, shall be supplied for the subsistence and maintenance of his son. The testator, therefore, seemed to mean that the trustees should be invested with some sort of discretion with respect to the application." And in *Shapland v. Smith*, Lord *Thurlow* was of opinion, that the trustees, being to pay the taxes, must have an interest in the premises; and that, therefore, the legal estate, for the life of the *cestui que trust*, was in them. So here, although the testatrix devised the estate to her

niece, yet she was not entitled to receive the rents, but the trustees were to pay them over to her, after discharging the expences of keeping the premises in repair, and every other necessary outgoing; and if such rents were in arrear, the trustees alone were empowered to distrain. It is, therefore, quite clear that the use was not executed in the niece. With respect to the objection raised, as to the variance between the arrears of rent demanded by the particulars, and those proved to be due, I entertain no doubt whatever; and the lessors of the plaintiff were entitled to recover, on proving that six months' rent was in arrear from the defendant, at the time the action was commenced.

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MOODY.

Rule refused.

*Spalding v. Hunter 2 Eq. 64*

READER v. BLOOM.

Friday,  
April 22d.

THIS was an action of trespass, for an assault, in which a verdict was found for the plaintiff, and his costs were afterwards taxed at 70*s*. On the taxation, before the Prothonotary, it appeared that the person who had acted as the plaintiff's attorney, in the prosecution of his suit, had not taken out any certificate since the year 1818, and had not been re-admitted; notwithstanding which, he had conducted the cause in the character of an attorney. Mr. Justice Park, on being applied to at chambers, in the last vacation, granted an order to stay proceedings, and that the defendant should pay the amount of the costs taxed, into Court, subject to a motion, as to whether the plaintiff could be entitled to them or not; or whether the whole or any part should be refunded to the defendant.

A plaintiff who has obtained a verdict against a defendant, is entitled to his full costs, although the person who conducted his cause, was not an attorney.

Mr. Serjeant Wilde, now applied for a rule *nisi*, that

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such a portion of the costs, as would go to the person calling himself the plaintiff's attorney, for his services in conducting the cause, might be refunded to the defendant; and he submitted that neither the person who acted as such attorney, nor his agent, could claim their costs as against the plaintiff; and, consequently, that he, not being compellable to pay those persons for their services, could not call on the defendant to pay him. The Learned Serjeant produced a note, furnished by Mr. *Le Blanc*, the Master of the *King's Bench* Office, stating, that costs were never allowed, in that Court, to persons who carried on causes as attorneys, when they were not so, or were not fully qualified to act as such. It is to the interest of the defendant as well as the plaintiff, that suits should be conducted by regular attorneys, the Court not having, in cases of misconduct, the summary jurisdiction over those persons who are not attorneys, which it has over its own officers; and the statutes, 2 Geo. 2, c. 23, § 17; 22 Geo. 2, c. 46, § 11; and 37 Geo. 3, c. 90, § 30, 31, are decisive to shew that attorneys permitting others to issue out writs, or prosecute actions, would be disabled from practising, and that such attorneys, acting as agents for persons not qualified, are liable to be struck off the roll; and that if any person practise as an attorney, without a certificate, or neglect to take one out, he is liable to a penalty, and thereafter incapacitated from practising as an attorney.

Lord Chief Justice **BEST**. — There appears to me to be no ground whatever for this motion. A plaintiff is not to be deprived of his costs, because his attorney has not regularly taken out his certificate, to qualify him to act as such; he must be taken to be ignorant as to the qualification of the person he employs as his attorney, and is not bound to inquire into, or satisfy himself as to that fact. There is, therefore, no pretence to say, that the amount of the costs paid into Court under the order, shall be refund-

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ed to the defendant, to the prejudice of the plaintiff. The Legislature in passing the statutes to which we have been referred, never intended to interfere with the rights of suitors; they have expressly guarded against it, and directed the punishment to be inflicted on the party offending. It is quite clear, that a person practising as an attorney, when he is not so, cannot sue for, or recover his costs; but the plaintiff is not therefore to be damnified; for it frequently happens, that a client makes advances to his attorney, at the outset or in the progress of the cause; and if that were the case here, which probably it is, and we were to say that the plaintiff is not entitled to his costs against the defendant, the former would never be able to get back such advances. We have, therefore, a sufficient power to protect him; for although the person who practised as an attorney without being qualified, might be deprived of any remedy he might have, as against the plaintiff, for the recovery of his coats; yet that cannot be extended to the latter, so as to prevent him from obtaining the full fruits of his judgment. The proper course would have been for the defendant to have proceeded against the person who conducted the plaintiff's suit, and if he had been brought before us, we should have been enabled to deal with him according to the nature of his offence; and if he had not duly taken out his certificate, his name would not be on the roll, and he would have been guilty of a contempt of Court, for which he might have been visited, and compelled to do justice to all parties.

Mr. Justice PARK.—If we were to grant this motion, it would form a most dangerous precedent; as, if a plaintiff employ an attorney to conduct a cause, and it be afterwards discovered that he is not qualified to act as such, the defendant may insist that the plaintiff has no right to recover, although he have obtained a verdict, and be entitled to judgment; and this is applicable to all suitors

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S.  
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from the highest to the lowest. The plaintiff in this case was not bound to inquire whether his attorney had taken out his certificate.

Mr. Justice BURROUGH, and Mr. Justice GASELEE, concurred in thinking that the application should have been made against the party who acted as the attorney.

Rule refused.

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Saturday,  
April 23d.

PAGE v. CHUCK.

In replevin, the defendant avowed for rent in arrear, for a dwelling-house, with the appurtenances; and it appeared in evidence that the plaintiff merely occupied the upper part of the house; and that the shop and yard were in the occupation of other tenants:—Held to be no variance.

THIS was an action of replevin, for taking the plaintiff's goods, under a distress, for rent of a dwelling-house situate in the parish of *Christ Church*, in the county of *Surrey*. The defendant, in his avowry, averred, that the plaintiff held the said dwelling-house, in which, &c. with the appurtenances, as tenant thereof, to the defendant, at the yearly rent of 30*l.*, payable quarterly; and that because 15*l.* for half a year's rent were in arrear, he well avowed the taking, &c.

The plaintiff pleaded in bar, first, *non tenuit*, and lastly, *riens in arriere*.

At the trial, before Lord Chief Baron *Alexander*, at the last Assises for the county of *Surrey*, it appeared, that the plaintiff did not occupy the whole of the house, in respect of the occupation of which the distress for rent was made, but only the upper part of it; and that the shop and yard were in the occupation of two other persons, under a separate demise.

The Jury having found a verdict for the defendant—

Mr. Serjeant *Lawes*, now applied for a rule nisi, that it might be set aside, and a nonsuit entered, on the ground of a variance between the tenancy set out in the avow-

ry, and that proved at the trial; as the plaintiff had merely occupied a part of the house in question; and that in the distress and in the avowry, it was stated, that the whole had been demised to him, with the appurtenances; whereas it was proved, that the yard and shop were in the occupation of others.

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PAOS  
"CHURCH

**Lord Chief Justice Best.**—This is a mere technical objection. The premises were properly described in the avowry, *sic*, as a dwelling-house with the appurtenances, and if a burglary had been committed, it would have been in the house demised to the plaintiff. In an action of replevin, it is sufficient if the substance of the issue be proved. The plaintiff occupied all the house, with the exception of the shop. I am always strongly inclined against objections of this nature, which are frequently not only an interruption to justice, but tend to throw a reflection on the law.

**Mr. Justice Park.**—I am of the same opinion. The house was let to the plaintiff, who occupied the whole of it, except the shop, and although the yard was let to another, he might have the use of it, as in *Press v. Parker* (*a*). There is, consequently, no variance.

**Mr. Justice Burrough, and Mr. Justice GASELEE, concurring—**

Rule refused.

(*a*) *Ante*, 158.

1825.Tuesday,  
April 20th.

The Mayor,  
Bailiffs and Bur-  
gesses of Ber-  
wick upon  
Tweed, being  
plaintiffs in the  
suit, the writ  
was directed to  
the Coroner,  
who was sworn  
to be one of the  
Burgesses. It  
being, however,  
mere service-  
able process,  
the Court refus-  
ed to set it aside;  
although it was  
objected that it  
should have  
been directed to  
elisors named by  
the Prothonota-  
ry.

**The Mayor, Bailiffs and Burgesses of the Borough of  
BERWICK UPON TWEED v. WILLIAMS.**

THIS was an action of trespass, and as the plaintiffs were the Mayor and Bailiffs of *Berwick upon Tweed*, the writ of *capias* was directed to the Coroner of that borough.

Mr. Serjeant *Taddy*, now applied for a rule *nisi*, that this writ, and all subsequent proceedings taken thereon might be set aside, on an affidavit, which stated that the Coroner was one of the burgesses, and, consequently, a party to the suit; and he submitted, that the writ should have been directed to elisors named by one of the Prothonotaries of the Court, as in the case of *Andrews v. Sharp* (a).

But the Court said, that the process being serviceable, they would not interfere; and that the case of *Andrews v. Sharp* was distinguishable from this, as there the application was for an attachment against the Coroners of *Middlesex*, for not attaching the Sheriff, against whom an attachment directed to the Coroners had issued, for not bringing in the body of a defendant, pursuant to a rule of Court.

The learned Serjeant therefore took nothing by his motion (b).

(a) 2 Sir W. Bl. 911.

(b) See *The King v. Peckham*, 2 Sir W. Bl. 1218.

1825.

Tuesday,  
April 26th.

## Dox, on the demise of UPTON and Another, v. WITHER-WICK.

THIS was an action of ejectment, brought by the lessors of the plaintiff against the defendant, who held an estate under them, and whose lease expired on the 6th April, 1824, and he having refused to quit, they sued out a writ of *habere facias possessionem*, under which they obtained possession on the 6th August following, at which time, some grass, and a crop of oats, consisting of nine acres, which the defendant had lately cut, a dove-cote, a quantity of pigeons, and all the fixtures found on the premises, were taken possession of under the writ.

Mr. Serjeant Peake, in the last Term, obtained a rule, calling on the lessors of the plaintiff to shew cause why it should not be referred to the Prothonotary, to ascertain the value of the crops of grass and oats, seized and taken possession of by them under the writ, and why they should not pay over to the defendant such sum as the Prothonotary might so ascertain such value to be, after deducting the amount of the rent due to the lessors of the plaintiff from the defendant. The learned Serjeant founded his motion on an affidavit, which stated that the defendant was entitled to the grass and oats, which had been cut, and were lying on the ground at the time the writ was executed, as a way-going crop.

Mr. Serjeant Spankie now shewed cause.—Whether the defendant were entitled to the grass and oats in question, as a way-going crop, would entirely depend upon the custom of the country. Besides, this is not only an application to the equitable jurisdiction of the Court, but, if entertained, would operate as a bill in equity. The plaintiffs, as landlords, had obtained a verdict in an action of ejectment against the defendant, as their tenant, on which

A tenant having held over after the expiration of his term, the landlord took (amongst other things,) severed crops, under a writ of *habere facias possessionem*, issued on a judgment obtained against the former, in an action of ejectment.—The Court refused to grant a rule to refer it to the Prothonotary to ascertain the value of such crops, or to order the landlord to pay over the balance to the tenant, after deducting the amount of rent due.

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 Doe  
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a writ of *habere facias possessionem* was sued out; and there had been no abuse of process, nor could any reason be adduced, to give the Court jurisdiction, or to induce them to interfere on a motion of this description, if even the defendant were entitled to his way-going crop, as he had another and distinct remedy for such a claim. He might have committed waste, or pleaded, in an action for the mesne profits, that he was entitled to such crop. The lessors of the plaintiff were entitled to possession on the 6th *April*, when the defendant's term expired; but they could not obtain it till the month of *August* following; and during that period the defendant was himself a trespasser, and, by unlawfully continuing in possession, waived any rights which he might previously have been entitled to as tenant of the premises.

Mr. Serjeant Peake, in support of his rule.—The lessors of the plaintiff have been guilty of an act of the greatest injustice towards the defendant, and the Court cannot allow them to receive the fruits which they seek to obtain, through their own misconduct and oppression. Although they might have taken all they found on the land, under the writ, yet they cannot execute it unjustly; and as the defendant was clearly entitled to the way-going crop, not only by the terms of the lease, but by the custom of the country, they could not take such crop; particularly, as it was actually severed before the writ was executed; and, therefore, they are summarily liable. Besides, the defendant's dove-cote, pigeons, and fixtures, were also taken under the writ; and although the defendant might have been a trespasser, by continuing in possession after his term had expired, yet the plaintiffs had their remedy by action.

Lord Chief Justice BEST was absent at chambers.

Mr. Justice PARK.—I am clearly of opinion, that this

rule ought not to have been granted in the first instance. It is an application of the first impression, and, if allowed, would have the effect of compelling one of our Prothonotaries to take a journey to a distant county, to inquire into the value of crops of a tenant taken by his landlord under a writ of *habere facias possessionem*, although he might not be competent to make such valuation. Besides, it would have the effect of encouraging tenants to hold over possession against their landlords, after their terms had legally expired. But the defendant has not even produced an affidavit of merits; on the contrary, it appears that his tenancy expired in April, and the writ of possession was not executed till the month of August following; during that intermediate period he was clearly a trespasser; and the plaintiffs have their remedy by an action for mesne profits.

Mr. Justice BURROUGH.—Although the defendant might be entitled to his way-going crop, he had no right to continue in possession, or to hold over after the expiration of his term; and if we were to grant this application, we should, in fact, decide that he was entitled to such crop. Although a landlord be only entitled to the land under a writ of *habere facias possessionem*, yet, if the tenant be entitled to his way-going crop, and it be improperly taken by virtue of the writ, he has his remedy by action.

Mr. Justice GASELEE.—I am of the same opinion. The defendant ought to have quitted on the expiration of his term; and the plaintiffs are entitled to the mesne profits from that time till the writ of possession was executed.

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Doe  
d.  
Upton  
v.  
Wetherwick.

Rule discharged, with costs.

1825.*Thursday,  
April 28th.*

An attorney's certificate, having been, by his agent's mistake, filed in the Court of King's Bench, in which Court he had not been admitted, instead of this Court; and he being sued for a debt, in an inferior court, sued out a writ of privilege.—The Court ordered it to be quashed, and a *procedendo* to be issued.

**NIXON v. HEWITT.**

A RULE was obtained, on the first day of this Term, by Mr. Serjeant *Taddy*, calling on the defendant to shew cause why the writ of privilege sued out by him in this cause should not be quashed, and a writ of *procedendo* issued; and that the defendant should pay the plaintiff the costs of this motion. The application was founded on affidavits, which stated, that on the 24th *February* last, proceedings were instituted by the plaintiff against the defendant, who practised as an attorney at *Norwich*. That, previously, all the proper offices had been searched, when it appeared that the defendant had been admitted an attorney of this Court in 1820. That the book kept at the office of the clerk of the warrants of this Court, was afterwards examined, to ascertain if the defendant were duly certificated; but that no certificate had been entered there, in the name of the defendant, for two years last past. That, after a further search, it was discovered that the defendant had not been admitted in any other of his Majesty's Courts of record; and that, as it did not appear that he was certificated, or entitled to practise as an attorney of this or any other Court at *Westminster*, the action was brought against him, at the suit of the plaintiff, in the *Guildhall* Court of *Norwich*, in which the defendant was held to bail, on the 26th *February* last. That a declaration was filed in that Court, to which the defendant pleaded his privilege as an attorney of this Court, and sued out his writ of privilege accordingly. That, on the 14th *March* last, search was made at the Stamp-office, at *Somerset-House*, when it was ascertained that the defendant had, in *June*, 1824, taken out his certificate for the year expiring in *November* in that year, although such certificate had not been duly entered in the Court of *Common Pleas*; but that on examining the certificate-book of the Court of King's Bench, it was found to have been entered there,

as if the defendant had been an attorney of that Court. That, on the said 14th *March*, further search was made at the Stamp Office, at *Somerset House*, when it was found that the defendant had not taken out any certificate, to practise as an attorney, for the current year, and that he was, therefore, uncertificated at the time of the arrest, and of his suing out the writ of privilege.

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NIXON  
v.  
HEWITT.

Mr. Serjeant *Vaughan*, now shewed cause, on an affidavit, stating, that the defendant had been admitted an attorney of this Court, in the year 1820; that he took out his certificate for the year 1824, on the 2d of *June*, in that year, which, according to the statute 37 *GEO. 3, c. 90*, would expire on the 1st *November*, following; and that, owing to a mistake of his agent in Town, it had been enrolled in the Court of *King's Bench*, instead of this Court. The learned Serjeant relied on the case of *Prior v. Moore* (*a*), where it was held, that an attorney may sue by attachment of privilege, although his certificate have expired and have not been renewed, if it be within a year from the expiration of his last certificate; and here, as the defendant had taken out his certificate for 1824, the only distinction between this case and that of *Prior v. Moore* is, that, in the latter, the attorney was plaintiff, and here, the party sued: but in either case, he is clearly entitled to his privilege; which continues for a year from the time of the expiration of his certificate.

Lord Chief Justice *BEST*.—It appears that the defendant's last certificate expired on the 1st *November*, 1824, and he was arrested at the suit of the plaintiff, on process issued out of the *Guildhall* Court at *Norwich*, on the 26th *February* last, when he was not a certificated attorney. Besides, he has not taken out a certificate for the present

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year; and that for the year 1824, was, through the mistake of his agent, entered in the certificate book of the Court of *King's Bench*, instead of this Court. The statute 37 *Geo. 3.*, c. 90, s. 27, requires every certificate, to be obtained by virtue of that act, to be entered in one of the Courts, in which the person described therein shall be admitted and enrolled, with the respective officer or officers of the said Court, within the time prescribed by the statute 25 *Geo. 3.*, c. 80. The plaintiff, therefore, not finding the defendant's certificate entered in this Court, where it ought to have been enrolled, was induced to believe that he was not an attorney. If it had been enrolled here, as it ought, the plaintiff would no doubt have acted differently; but as the defendant must be responsible for the acts of his agent, and as it is not denied that a debt is due from him to the plaintiff, we cannot assist him. At all events, he should not have taken the objection, or pleaded his privilege, until he had ascertained that he was fully justified in so doing.

The rest of the Court concurring—

Rule absolute.

Saturday,  
April 30th.

MARY DOWSE, Widow, v. COXE and Another.

THIS was an action of *assumpsit*. The first count of the declaration stated; That whereas, before the making had arisen, and a certain suit was pending in Chancery, in which the plaintiff, and divers other persons, including infants, were plaintiffs, and P. K., T. B., since deceased, and J. R., defendants; and that it was ordered by the Vice Chancellor, with the consent of the attorneys of the parties in the suit, that the several matters in question in the suit, and all disputes and differences then subsisting between certain of the plaintiffs, and P. K. and T. B., since deceased (being certain of the defendants), should be referred to the arbitration of W. C., who was to be at liberty to make one or more award or awards as he should think fit; and that in case either of the parties should happen to die before the making of the award, the reference was not to state, but the executors and administrators of the parties so dying, were to be considered and taken as parties to the award, in like manner as their testator or intestate; that before the making of the award T. B. died; and the arbitrator afterwards awarded that the defendants, executors of T. B., should, on 3d. pay the plaintiff £251, out of T. B.'s assets; by reason of which, the defendants, as executors, became liable to pay, and, being so liable, they executors as aforesaid promised to pay:—Held, on special demurrer, that the action was well brought against the executors; and that the declaration was sufficient;—although it was objected, *first*, that the promise alleged to have been made by the defendants was a personal promise, and for which no consideration was stated; *secondly*, that a sufficient authority to refer was not shewn, as it was made by the consent of the attorneys of the parties, some of whom were infants, who could not appoint an attorney; and *lastly*, that the authority to refer was revoked by the death of T. B.

of the promise and undertaking of the defendants, as thereafter next mentioned, certain differences had arisen, and a certain suit was then depending in the High Court of Chancery, in which the plaintiff, *Mary Dowse*, widow, and divers other persons, including infants, by their next friend, were plaintiffs, and *Peter King*, *Thomas Biddell*, (since deceased), and *John Reay*, defendants;—and whereas, by an order of the Right Honorable Sir *John Leach*, Knight, Vice Chancellor of *England*, bearing date the 14th June, 1823, it was, amongst other things, ordered, with the consent of the attorneys of the parties in the said suit, that the several matters in question in the said suit, and all disputes and differences then subsisting between the said plaintiff, *Mary Dowse*, *John Lightfoot Wilkinson*, and *Mary his wife*, *William Jones*, and *Elizabeth his wife*, and *James May*, and *Susannah his wife*, (being certain of the plaintiff's), and *Peter King* and *Thomas Biddell*, since deceased, (being certain of the defendants), should be referred to the award, arbitrament, and final determination of *William Cooke*, of *Lincoln's Inn*, Esq., who was to be at liberty to make one or more award or awards, of and concerning the matters thereby referred to him, as he should think fit, so as such award or awards should be made in writing, under the hand and seal of the said *William Cooke*, ready to be delivered to the said parties, or to such of them as should require the same, on or before the 23d June then next, or on or before such ulterior day or days as the said *William Cooke* should from time to time appoint, in writing, by indorsement upon the said order; and in case either of the said parties should happen to die before the making of the final award under the said reference, the said reference was not to abate, but the executors and administrators of the parties so dying, were to be considered and taken as parties to the said order, in like manner as their testator or intestate. The plaintiff then averred, that afterwards, and before the making of the award of the said *William Cooke*,

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thereinafter mentioned, to wit, on, &c., the said *Thomas Biddell* died, to wit, at, &c., and that the said *William Cooke*, afterwards, and during the time for making his award, to wit, on, &c., at, &c., made his certain award in writing, under the hand and seal of him the said *William Cooke*, between the parties aforesaid, of and concerning the said differences, and thereby then and there, amongst other things, awarded that the said defendants, as executor and executrix of the said *Thomas Biddell*, deceased, should, out of the assets of the said *Thomas Biddell*, on the 27th of July then next, pay to the plaintiff the sum of 225*l.*; of which award of the said *William Cooke*, the said defendants, as executor and executrix as aforesaid, afterwards, to wit, on, &c., had notice; to wit, at, &c., by reason of which said premises the said defendants, as executor and executrix, as aforesaid, became liable to pay to the plaintiff the said sum of 225*l.*, according to the tenor and effect of the said award; and being so liable, they, the said defendants, executor and executrix as aforesaid, to wit, on, &c., at, &c., in consideration thereof, undertook, and then and there faithfully promised the plaintiff to pay to her the said sum of 225*l.*, at the time and in manner as in the said award was directed; and the plaintiff in fact said, that, although the said defendants, executor and executrix as aforesaid, were afterwards, to wit, on, &c., requested to pay the said sum of 225*l.* to the plaintiff, according to the tenor of the said award; yet that the said defendants, executor and executrix as aforesaid, not regarding their said promise and undertaking so by them, in manner and form aforesaid, made, but intending to injure the plaintiff in this behalf, did not, nor would, when so requested as aforesaid, nor at any time before or since, pay the said sum of 225*l.*, or any part thereof, to the said plaintiff, but wholly neglected and refused so to do.

To this count the defendants demurred specially, assigning, for causes, that it was not stated, nor did it appear, in the said counts, that the defendants, before the making of

the award, had any notice of the said supposed submission, or were parties thereto, or were summoned to appear before the said arbitrator, or had any notice of the said supposed submission; and also, for that it was stated, in and by the said count, that the defendants personally undertook to pay the said sum of money therein mentioned, whereas no liability or other consideration was stated to support such a promise; and also, for that it was not alleged, nor did it appear, in or by the said count, that the said defendants had, at any time, any assets of the said *Thomas Biddell*, deceased, out of which they could have paid the said sum of money in the said count mentioned, or any part thereof; and also for that the said count was, in other respects, uncertain, informal, and insufficient, &c.

The cause now came on for argument, when—

Mr. Serjeant *Wilde*, in support of the demurrer.—The second count is bad, and cannot be supported, on three grounds:—*First*, the promise alleged to have been made by the defendants is without a consideration, as it is averred to have been made by them personally, and not as executor and executrix; and although it is alleged that they undertook to pay the plaintiff the sum awarded at the time, and in manner as directed by the award, yet that is a mere personal obligation, which has no reference to their testator's affairs; and a judgment entered up on this count would bind them personally, and not make them merely chargeable out of the assets of their testator. In *Henshall v. Roberts* (*a*), it was held, that a count upon an account stated with the plaintiff's *executrix*, &c., (not saying as *executrix*, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in their representative capacity. And in *Brigden v. Parkes* (*b*), where the three first counts of a declaration in *assumpsit* against exe-

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cutors stated promises made by the testator, and the fourth was for money had and received by the defendants, *as such executors as aforesaid*, stating a promise to pay, by them, *executors as aforesaid*; and the last count was on an account stated by the defendants, *executors as aforesaid*, stating the promise to pay in the same manner;—it was held bad on general demurrer. In that case, the executors were considered liable in their own right; and here, although the arbitrator has awarded the defendants to pay out of the assets of their testator, yet it does not appear that they had any assets, which is one of the grounds of the demurrer. In *Race v. Hughes* (*a*), it was held, that a promise by an executor, although in writing, did not render him personally liable, unless there were a sufficient consideration. In *Barry v. Rush* (*b*), the defendant bound himself, *as administrator*, to abide an award; and his entering into the bond was considered to amount to an admission of assets. So in *Worthington v. Barlow* (*c*), the administratrix submitted to the award; and Lord *Kenyon* said, that “as the arbitrator has awarded the defendant to pay the amount of the plaintiff’s demand, it is equivalent to determining as between these parties, that the administratrix had assets to pay this debt.” Here, however, the arbitrator expressly ordered the defendants to pay the plaintiff a given sum, on a particular day, out of the assets of *Biddell*; and the declaration does not state, nor is there any averment to shew, that they had assets so to do.

Secondly, it is stated that the order of reference was made by the consent of the attorneys of the parties in the suit, and is not confined to the several matters in question in the suit, but is a reference of all disputes and differences then subsisting between certain of the plaintiffs and certain of the defendants, and does not extend to the whole; at all events the attorneys could not have any authority to submit matters out of the suit, over which they had no control. The defendants, there-

(*a*) 7 Term Rep. 350, n. (*b*) 1 Term Rep. 691. (*c*) 7 Term Rep. 453.

fore, as executors of one of the parties, cannot be bound by the award; for as the suit was between several persons, some particular parties could not be selected, and the others omitted or rejected. In *Athelstone v. Moone* (*a*), it was held, that a submission of all matters in difference, imported all matters which either party had, jointly or severally, against each other. And, here, the infants could not appoint an attorney; and supposing their interests to be omitted, the award only operates on part of the matters referred, and, consequently, is altogether void.

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*Thirdly*, by the death of *Thomas Biddell*, the submission was necessarily revoked. Even marriage is a virtual revocation of a submission. An agreement by a testator cannot bind his executor to a reference: and here the defendants have been directed by the arbitrator, to pay out of the assets of the deceased, which could not be made the subject of a reference during his lifetime; and if it could be deemed binding, they might be liable to an unlimited extent; and they were further directed to pay on a given day, although it might have been impossible for them to ascertain or collect such assets. At common law, the death of a party, at any time before final judgment, would have abated the suit, but the statute 17 Car. 2, c. 8, makes a provision for such a case, between verdict and judgment. In *Vynior's case* (*b*), it was determined that a man cannot, by his act, make an authority, power, or warrant, not countermandable, which is, by the law, and of its own nature, countermandable; as, if a person submit to an arbitration, after it was made by express words irrevocable, yet it may be revoked. So here, the authority of the arbitrator was limited to the lives of the parties submitting to arbitration, and cannot bind their executors. In *Clapham v. Higham* (*c*), where a cause was referred to arbitration, under an order of a Judge at *Nisi Prius*, by the consent of the parties, one of whom revoked his sub-

(*a*) Com. Rep. 547.      (*b*) 8 Rep. 82 a.      (*c*) 7 B. Moore, 403.

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mission before the award was published; notwithstanding which, the arbitrator afterwards made his award; the Court set it aside. So a letter of attorney, to deliver livery of seisin, after the death of the feoffor, is void (*a*). The submission, here, could not operate beyond the life-time of *Biddell*, the testator; and as the award was not made until after his death, it is altogether void.

*Lastly*, this action being founded on an award made under an order of the Vice Chancellor, cannot be maintained. In *Emerson v. Lashley* (*b*), it was held, that no action will lie in this Court, to recover costs ordered to be paid by a rule of an inferior court, in the course of a suit there, notwithstanding the defendant's not being liable to an attachment of the inferior court, by being resident out of its jurisdiction. And although in *Smith v. Whalley* (*c*), it was held, that an agreement between parties to a Chancery suit, binding themselves, their executors, and administrators, under an order of the Court, and acted upon as such, might be ground of an *assumpsit* at law; and although the Court so decided, the defendants having, by the terms of their agreement, raised a sufficient consideration for an *assumpsit* against themselves; yet they said, that the general rule was clear, that the mere order of another Court was not a good ground of action: and the case of *Carpenter v. Thornton* (*d*) is decisive to shew, that an action at law cannot be maintained on a decree of a Court of equity, for a specific sum of money, founded on a mere equitable consideration.

Mr. Serjeant *Taddy*, for the plaintiff.—As to the *first* objection, whether the promise alleged to have been made by the defendants is a personal promise, and not made in their representative character, the case of *Powell v. Graham* (*e*), is decisive, to shew that it was made by them in

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| (a) Bac. Abr. tit. "Authority,"<br>E.; Co. Lit. 52 (b).<br>(b) 2 H. Blac. 248. | (c) 2 Bos. & Pul. 482.<br>(d) 3 Barn. & Ald. 52.<br>(e) 1 B. Moore, 305. |
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their latter character only; and Lord Chief Justice Gibbs there drew the distinction, that where an executor is charged either for money had and received by him, money lent to him, or on an account stated of money due from him personally, he is personally liable, but an account stated with an executor, as such, of money due from the testator, makes him liable in his representative character only.

[The learned Serjeant was proceeding with his argument, when he was stopped by the Court, who said, that they entertained no doubt whatever on this point.]

*Secondly*, with respect to the authority to make the submission, it must be considered that it was founded on a proceeding in a Court of equity, and not of common law. The parties to the suit, by the consent of their respective attorneys, submitted the several matters in question in the suit, and all disputes and differences then subsisting between them, to arbitration. It does not appear that they were merely the attorneys in the suit; they might have been the general attorneys or agents of the parties; and if the defendants had disputed their authority to consent, they should have taken issue on that fact; and a subsequent adoption is sufficient to confirm a particular authority. In *Filmer v. Deliver* (*a*), the Court refused to set aside an order of reference, which had been made with the consent of counsel and attorney, although one of the parties, by affidavit, expressly denied his attorney's authority to refer. And *Banfill v. Leigh* (*b*) is an authority to shew, that a person acting as an attorney, and duly empowered so to do, may submit matters in difference between his principals and third persons to arbitration; and that all their rights and interests may be conferred on him as such; and although some of the parties here are infants, yet as the proceedings were in Chancery, it must be presumed that due regard was paid to their interests by

(*a*) 3 Taunt. 486.

(*b*) 8 Term Rep. 571.

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that Court. In *Cowyn's Digest* (a), it is said that an infant cannot submit; but yet if he join in a submission, it would render the award voidable only, and not altogether void: and in *Boswyer v. Blorksidge* (b), which was an action on a joint obligation, against a father and son; it was argued that a submission by an infant was void, and that consequently the bond was void; but the Court gave no opinion on that point; but held, that the father's submission for himself was good, although his son were a party; and that the arbitrators might make their award between the father and the plaintiff only. In *Bacon's Abridgment* (c), it is said, that in debt on an award, the plaintiff need not set forth more than makes for him. Here, too, the arbitrator, by the terms of the order, was empowered to make one or more award or awards; and in *Rolle's Abridgment* (d), it is laid down, that if *A.* and *B.* of the one part, and *C.* of the other, submit themselves to the award of *J. S.*, of all matters between them; *J. S.* may make an award of any matter between *A.* only and *C.*, though *B.* hath nothing to do therewith, for the submission shall be taken distributively. And although in *Bacon v. Dubarry* (e), it was held, that a submission by *A.*, as attorney for *B.*, concerning accounts between *B.* and *C.*, was good to bind *A.* but not *B.*; yet there the award was bad for want of reciprocity; and in *Brown v. Mervorell* (f), it seems that a submission by an agent was good; as, there, the order of reference was between *J. B.* in the name, and for the behalf of one *W. M.* of the one part, and *A. M.*, executor of *R. O.* of the other. If so, *a fortiori*, the attorneys of the parties may consent to refer; and if a *prima facie* authority be shewn, it is of itself sufficient.

*Thirdly*, the death of *Thomas Biddell*, the testator, did

(a) Tit. "Arbitrament," D 2.

(d) Vol. I, 246, l. 20.

(b) 3 Lev. 17.

(e) 1 Salk. 70.

(c) Tit. "Arbitrament," G.

(f) Dyer, 216 (e).

not necessarily operate as a revocation of the submission. It is quite clear, that a testator may bind his executors. And although in *Cooper v. Johnson* (*a*), it was held, that the authority of an arbitrator is determined by the death of either party before the award; yet Lord Chief Justice Abbott there observed, that it might be very proper, in orders of *Nisi Prius*, in future, to insert a clause to obviate the inconveniences arising from the death of either party before the making of the award. And in the late case of *Tyler v. Jones* (*b*), where, by an order of reference, an award was to be delivered to the parties, or if they or either of them were dead before the making of the award to their respective personal representatives, on or before a given day, with liberty to the arbitrator to enlarge the time for making his award; and the plaintiff died before the award was made; and after his death the arbitrator enlarged the time for making the award:—It was held, that an award made within the enlarged time was good; and that an action would lie against the executors, on the undertaking of their testator to perform the award.

*Lastly*, This action is not founded on an order of Court, but on an agreement arising out of that order; and if so, the cases of *Emerson v. Lashley*, and *Smith v. Whalley*, do not apply.

*Mr. Serjeant Wilde* in reply.—The objection, that it does not appear on the face of the declaration, that the reference to the arbitrator was made by competent authority, has not been answered; as it is merely stated, that it was done by the consent of the attorneys of the parties to the suit; and although it has been said, that they might have been the general attorneys or agents of the parties in the cause, yet such consent must be confined to the order issued by the Vice Chancellor; and although, technically speaking, there are no attorneys in the Court of Chancery,

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yet, in common parlance, solicitors practising there must be considered as such; and it must be inferred in this case, that they were merely the attorneys of the parties to the suit, as it is not stated that they had any special authority to act out of it, or extend their power beyond the matters in question in the suit then pending, and the order only can be referred to, to shew the nature of the authority. If such consent had been given by agents, it would be necessary to aver that they were duly authorised in that behalf; and although it may not be requisite to shew the exact terms of authority, yet some authority must appear. The case of *Banfill v. Leigh* is distinguishable, as there the authority of the attorney was not only shewn, but it also appeared that he was equitably entitled to the sum awarded; and he bound himself to perform the award. Here, however, there is no averment that the parties consented by their attorneys, but only that the latter consented; and if so, their authority should have been shewn. At all events, they could not be authorised to consent for parties who were infants or married women, for these could not appoint an attorney. And in *Cavendish v. Cavendish* (a), Lord Chancellor *Nottingham* declared, that he never would decree the performance of an award, which should bind an infant; and the Court refused to bind an adult, where the interest of an infant was concerned: and the same principle was laid down in *Evans v. Cogan* (b), where an arbitrator awarded that a mother should procure her daughters, who were married, to convey a house, and one of the daughters was dead, leaving an infant heir, it was held, that they were not bound; and Lord Chancellor *King* there said, "there being an infant heir of the deceased daughter, I do not see how the answers of the married daughters can bind themselves, as to their inheritance, much less their husbands; and it is impossible to bind the infant heir." Here, too, not only all the matters in the suit were referred, but all dis-

putes and differences subsisting between certain of the plaintiffs and certain of the defendants; and the arbitrator has confined his award to the payment of a certain sum from the defendants to the plaintiff. And in *Mitchell v. Staveley*, where there was a reference of all matters in difference between the parties, and the award was silent as to one; Lord *Ellenborough* said (a), "the arbitrators were called upon to act on a matter in controversy, and have not acted. The award, therefore, is not only not final, but there is no award at all respecting one of the matters in difference referred, which it is stated to have been notified to the arbitrators. It was a condition of the submission, that they were to award upon all matters in difference between the parties." Besides, the order to refer was void, as it was founded on the consent of the attorneys of the parties in the suit, some of whom were infants; and the suit cannot be put an end to or determined without the authority of all the parties; and in *Antram v. Chase* (b), where an award was offered in evidence, it was held, that the execution of the submission deed, by all the parties, must be proved; on the principle, that there must be the accession of all to the common agreement of all, which is the consideration to each, for entering into the agreement. The case of *Filmer v. Delver*, does not apply, as there the cause only was referred, and the arbitrator had taken no steps to adjust the matter, expressly appointing a future day for a meeting.

As to the revocation of the arbitrator's authority, although a testator may bind his estate and executors to pay any sum he owed, and they would be liable if they did not, as for a breach of contract; yet he could not bind them to submit to an arbitration. If the testator himself had covenanted not to revoke, he might afterwards have done so by deed. So, there may be a revocation of an authority by operation of law, and no contract can prevent it. Here,

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there was no express or implied contract by the testator not to revoke, and it is quite clear that the suit in equity abated by his death. In *Tyler v. Jones* (*a*), the order of reference provided in express terms against the death of the parties, as, if either of them died before the award, the award was to be delivered to their personal representatives. At all events, the plaintiff should have averred that the defendants had assets. They were no parties to the reference, and a submission by an executor or administrator, is not of itself an admission of assets. Lastly, this action cannot be maintained, as it is founded on the non-compliance with an order of a Court of equity. That is its real foundation, and on which the defendants' liability to pay the plaintiff can alone attach; and it does not appear, on the face of the declaration, whether the plaintiff's claim were founded on a legal or equitable demand.

Lord Chief Justice Best.—The first objection that has been made to this declaration is, that the promise is a mere personal promise by the executor and executrix, for which there is no consideration. That is not so: for the promise is made by the defendants *as* executor and executrix; and is, consequently, not a promise to pay out of their own personal property, but out of the funds or assets of their testator, and which might come to them in their representative capacity. If we were to look at particular words only, *viz.* "executor and executrix," we might consider this case to fall within that of *Henshall v. Roberts*, and other decisions in the Court of King's Bench, with which I perfectly agree, and which have laid down, that a promise by executors, without stating it to be made *as* executors, is a personal engagement. Here, however, on looking at the whole declaration, there can be no doubt, but that the promise sufficiently appears to have been made by the defendants, *as* executor and executrix, and

(a) 3 Barn. & Cres. 144.

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not personally. The declaration recites, that a suit was pending in *Chancery*, and that, by an order of the Vice Chancellor, it was directed, that the several matters in question in the suit, and all disputes and differences then subsisting between certain parties, should be referred to arbitration. That the arbitrator, by his award, ordered that the defendants, as executor and executrix of *Thomas Bedell*, (one of the parties), should, out of the assets of their testator, on a certain day, pay a certain sum to the plaintiff. The declaration then states, that the defendants, as executor and executrix, had notice of the award; and that they, by reason thereof, became liable, as executor and executrix, to pay that sum to the plaintiff, according to the tenor of the award; and that, being so liable, they the said defendants, "executor and executrix" as aforesaid, promised to pay the said sum awarded at the time, and in manner as in the award was directed; that is to say, they promised to perform what they were directed by the arbitrator to perform, *viz.* they promised to pay such sum out of the assets of their testator; and if so, they became liable, according to the tenor of the award: and it would be a gross violation of common sense, to hold that they were personally liable, because the promise is stated to have been made by them, executor and executrix as aforesaid, by the mere omission of the word *as*.

The second objection is, that the arbitrator was not properly constituted or duly appointed. Our attention was not directed to this point by the demurrer. If an arbitrator have no authority, that is matter of substance, and the question might have been raised on general demurrer. But if it appear, that though imperfectly appointed, he has some, but not a sufficient authority, it can only be taken advantage of on special demurrer. Enough, however, appears on the face of the declaration, to induce us to conclude that the arbitrator was regularly and duly appointed, and authorised to make the award he has made. Whether or not his authority extended so far as to enable

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him to decide, as to all the disputes and differences between the parties, besides the several matters connected with the suit, is another question, and one upon which we are not now called on to give an opinion. It is sufficient for us to say, that he was duly authorised to make the award in the terms he has done. As to this point, the declaration states, that, by an order of the Vice Chancellor, it was directed, "with the consent of the attorneys of the parties, that the several matters in question in the suit, and all disputes and differences then subsisting between certain of the plaintiffs and certain of the defendants, should be referred to the award of an arbitrator, who was to be at liberty to make one or more award or awards, of and concerning the matters referred to him." It must be presumed, that the Vice Chancellor acted rightly in making the order, and that the arbitrator pursued the proper course, before he arrived at the conclusion he did. It has been further urged as an objection to the authority of the arbitrator, that there were infants in the suit who might have been prejudiced by the reference; and that his Honor should have referred it to the Master, to ascertain what course would be most beneficial to them. Whether or not such reference should have been made, or what course was the most proper to be adopted, or what, in fact, was done, in their regard, is not matter of which we can take cognizance. We must presume, as the proceedings were in *Chancery*, that their interests were especially attended to; and, unless the contrary appear, we must take it for granted, that that Court directed all proper steps to be taken; and that if such a reference were necessary, it has been made. Although an infant cannot appoint an attorney, or submit to arbitration, yet his next friend may require the assistance of a professional adviser, and call on an attorney to act for him; and if so, it gets rid of the objection. It has also been said, that the order of reference was made with the consent of the attorneys of the

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parties in the suit. Technically speaking, there are no attorneys on the roll in the High Court of Chancery; but, as it is not stated that they were the attorneys or agents appointed for the management of the suit only, or to conduct the cause generally, we must conclude that they were the parties properly authorised to act on behalf of their respective clients. There can, therefore, be no objection to the appointment of such attorneys, or to their acting under an authority thus delegated.

It has been further contended, that, admitting these attorneys to have been the attorneys or agents of the parties generally, the declaration does not shew what was the extent of their authority; or that, at all events, it is not sufficiently alleged. But the declaration states, that they were the attorneys of the parties to the reference; and this fact is admitted by the demurrer. If the defendants had intended to dispute their authority, they should have taken issue on that point. Supposing them, then, to have been the attorneys properly authorised, they had sufficient power to consent to the reference. As to whether they had authority to refer matters out of the suit, it is not necessary to determine: they, if specially authorised for that particular purpose, might refer matters in dispute between the litigant parties, as well out of the suit as in it. And although their powers might be revoked by the death of their principal, yet, acts done before his death might affect his estate after; and if he had said that his death should not prevent the arbitrator from making his award, *a fortiori*, he might authorise his attorney to make the like engagement.

Another difficulty has been raised, as to whether, all the parties having referred differences in which they were mutually and jointly concerned, the arbitrator could decide any matter separately, or consider their separate interests. By the order of reference he was specially authorised to make one or more award or awards. If so, matters out of

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the cause as well as in it, might be referred to him. He was not obliged to make two or more awards at the same time; and, even if the claims were joint, he might make a separate and distinct award, according to the case of *Athelstone v. Moone*, where, on a motion for an attachment for not performing an award, it appeared, that the submission was of all matters between the parties, (without saying, between them or either of them,) so as the award should be made of the premises by a particular day; and the award was, that one of the defendants should pay a sum of money, due from him to the plaintiff; and it was objected, that as the submission must be understood of joint demands which the plaintiff had against the defendants, the award of a several debt, from one of them only, was not within the submission: but the objection was not allowed; for the Court held, that a submission by several persons of all matters in difference between them, imports a submission of all matters that either had against the other, jointly or severally. If several parties owe a sum of money to *A. B.*, an arbitrator may order one of them to pay it, and, by a subsequent award, might direct the others to reimburse the party who made the payment. So here, the arbitrator might order a certain sum to be paid by the defendants, as executors, out of the assets of their testator, and might direct the other defendants in the suit to pay a further sum; as the plaintiff might have distinct claims on each. Here, however, it does not appear that the arbitrator has decided on any separate matters, or anything wherein all the parties were not jointly concerned. All their interests might have been joint. It has further been urged, that the arbitrator could not decide on all the matters, because some of the parties were infants; and that, as he could not decide on all, his award is not conclusive as to any. He has not affected to decide on any matters respecting the infants; and it is clear, that, if the reference be in general terms, without expressly directing that *all matters* referred

shall be decided, the award may be good for part. The arbitrator might do justice to all parties, as the order of the Vice Chancellor did not contain any condition that he should decide on *all* the matters referred. But in *Mitchell v. Staveley* (a), all matters in difference were referred; and the arbitrator was to make his award of and concerning the premises; Lord *Ellenborough* said, "it was a condition of the submission, that the arbitrators were to award upon *all matters* in difference between the parties. That is an important difficulty, against which the plaintiff has to contend." That case, therefore, does not impugn, but is rather confirmatory of, the old law. Here, however, the order contains no such stipulation; probably because the Vice Chancellor might, in an equitable light, have seen that the arbitrator might have found difficulty in deciding at once between the conflicting claims of all the parties; and he was, therefore, empowered to make one or more award or awards, according to his discretion. The last, and indeed the main objection, is, that the authority of the arbitrator was revoked by the death of *Thomas Biddell*, one of the parties to the suit. On this point I have felt some difficulty; for the personal representatives of a testator or intestate might, in such cases, be placed in a very critical situation; as, if an executor had been appointed, he could not obtain probate until the award was made; or, if a creditor took out letters of administration, he might be compelled to pay, according to the terms of the award. But if a man in his life-time chuse to put himself in such a predicament, we cannot, when the shadows of death have encompassed him, extricate his representatives. The testator here has said, in effect, that the arbitrator should go on with his award, notwithstanding his (the testator's) death. The inconvenience to which he has subjected his representatives, is the fruit of his own act; and it was for them, before they under-

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took their office, to determine whether they would take the burthen, and interfere with his estate, or not. It has been said, indeed, that this amounts to no more than a covenant not to revoke the authority delegated, by any act of the party covenanting, and that, notwithstanding such covenant, death will unavoidably operate as a revocation. But that is not so. *Biddell's* engagement was, not only that he himself would not revoke, but that even his death should not have the effect of abating the reference, or of preventing the arbitrator from making an award after his death. There is nothing to hinder the executors from being bound by the reference. It has further been said, that a cause would abate by the death of a party; and it has been asked, whether an agreement that a suit should not abate by death, would enable a Court of law to carry it into effect, so that the cause might be proceeded in. It is unnecessary to answer that question here, for *conventio vincit legem*; and, although an agreement of the parties may not give a Court jurisdiction to order a cause to be continued after such agreement, yet it will not apply to a domestic forum, set up by the parties themselves. If a person appoint an arbitrator, although not under a rule of Court, yet, as he thereby gives him a peculiar authority, he must act conformably to the mode which he has himself prescribed; particularly, if, by so doing, no principle of justice or public policy be violated or militated against. There can, under all the circumstances of this case, and according to the high character of the arbitrator, be no doubt but that justice has been done; and as the objections are, at best, merely technical, I am clearly of opinion that the plaintiff is entitled to judgment.

Mr. Justice PARK.—I need only say that I fully concur with all that has been said by my Lord Chief Justice.

Mr. Justice BURROUGH.—Considering that the submis-

sion to arbitration was made under an order of the Vice Chancellor, we must presume that all the necessary preliminary steps had been taken, and that the order was regularly made. Although it has been said, that some of the parties to the suit were infants, and could not appoint an attorney, or submit to arbitration; yet their interests might have been entrusted to the attorneys by their fathers, or next friends; and it is apparent, from the terms of the award, that their interests must have been very remote, as the sum directed to be paid by the defendants to the plaintiff, neither operates in favour of, nor against, them; and they do not appear to have been involved in the disputes. It has been insisted, however, that the arbitrator's authority was revoked by the death of *Biddell*. But the law as to revocation does not apply to this case, as there was a special contract entered into by the party himself, by which the reference was not to abate, although he should die before the award was made; and his personal representatives were to be considered as parties to the order. That was a continuing contract, to extend beyond the death of the testator, by his own express engagement; and if so, the defendants, as his executors, cannot object to it, as they can only be liable to pay the plaintiff out of the assets of their testator. The plaintiff can only recover as against his estate, and she has accordingly declared against the defendants as his executors. Besides, the award was founded on an order made in a suit in equity, and there is a manifest distinction between such a suit, and a suit at law; as there, all must be made parties, however remote their interests may be; and that is the usual, if not uniform, course, adopted in Courts of Equity. This, too, being a suit of that nature, the arbitrator had an equitable jurisdiction, and ~~was bound to~~ therefore make his award as between some of the parties; although that might not be done in a legal reference; where an arbitrator is bound to pursue the course directed by law. Considering there-

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fore, that the suit originally commenced in a Court of equity, and that the submission was made by an order of the Vice Chancellor, I am of opinion that the arbitrator had a jurisdiction to make an award between any of the parties, even between two of the plaintiffs in the suit; and as the judgment must be entered up *de bonis testatoris*, the plaintiff is entitled to recover.

Mr. Justice GASELEE.—I perfectly concur with the Court, that the plaintiff is entitled to judgment. One of the causes of demurrer is, that it is not alleged in the count that the defendants had any assets of their testator, out of which they could have paid the sum in that count mentioned; but *Powell v. Graham*, is an express authority, to shew that such an averment is unnecessary in this case, as it was there decided, that if a testator promise that his executor shall pay a certain sum of money after his decease, the plaintiff need not aver in his declaration that the defendant had assets, or that he promised as executor to pay; and here there is a sufficient consideration to raise such a promise, as the testator agreed that the reference should not abate by his death, and that his executors were to be considered and taken as parties to the order. Another cause of demurrer was, that it did not appear that the defendants had any notice of the submission; but it is averred, that they had notice of the award, which is quite sufficient to raise a consideration for the promise, which is the subject of this action; and the liability of the defendants, as executors, attached on an express engagement made by the testator, which was to continue after his death. The objections raised are wholly beside the grounds assigned in the special demurrer, and were not brought to the notice of the Court in the margin of the Paper Book, where they should always be stated.

Judgment for the plaintiff.

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## NORRIS and Others v. POATE.

THIS was an action of *assumpsit* for money had and received. The declaration contained the usual money counts; and the defendant pleaded the general issue.

At the trial, before Lord Chief Justice Abbott, at the last Summer Assizes for Southampton, a verdict was found for the plaintiffs,—damages, 20*l.*, subject to the opinion of the Court on the following case:

By an act of Parliament, passed in the 12th year of the reign of Geo. 3(a), intituled, "An Act for Repairing and Widening the Roads from Sheet Bridge to Portsmouth, and from Petersfield to the Alton turnpike road near Ropley, in the county of Southampton." Trustees were appointed for the purposes of the Act, with power to erect turnpikes upon the said roads; and it was thereby enacted, as to the tolls, as follows: "The respective tolls following shall be demanded and taken of the person or persons attending any cattle or carriage hereinafter mentioned, at every turnpike, by such person as shall be appointed for that purpose, before any cattle or carriage shall be permitted to pass through the same; that is to say, for every horse, mare, gelding, mule, or ass, drawing any coach or other pleasure-carriage, the sum of three-pence, but if drawing any stage coach or machine, the sum of six-pence; for every waggon, wain, cart, or other carriage, drawn by four horses, oxen, or other beasts of draught, the sum of one shilling; and drawn by three horses, oxen, or other beasts of draught, the sum of nine-pence; and drawn by two horses, oxen, or other beasts of draught, the sum of

by the same four horses, but driven by a different coachman, and carrying different passengers and parcels for hire, passed through the same gate:—Held, that a second toll was not payable in respect thereof.

Tuesday,  
May 3rd.

By a turnpike act, it was enacted (*inter alia*) "that a toll of six-pence should be demanded and taken for every horse drawing any stage coach, from the person or persons attending the same." A subsequent clause provided, "that if any person or persons should have paid the toll for any cattle or carriage passing through the gate, the same person or persons, on producing a ticket, should be permitted to pass and repass through the same gate with the same cattle or carriage, toll-free, at any time during the same day." A stage-coach drawn by four horses, passed through and paid the toll; in the evening of the same day, a different coach, called by the same name, belonging to the same proprietors, and drawn

(a) Cap. cviii.

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six-pence; and drawn by one horse, ox, or other beast of draught, the sum of three-pence; and for every horse, one penny." And it was further enacted by the said act, "that if *any person or persons* should have paid the tolls, by that act granted and ascertained, for the passing of any cattle or carriage through any turnpike erected by virtue of the act, *the same person or persons*, upon producing a note or ticket of the day, denoting such payment, should be permitted to pass and repass through the same gate or turnpike, *with the same cattle or carriage*, toll-free, at any time or times during the same day, to be computed from twelve of the clock in one night to twelve of the clock in the next night, which said note or ticket the collectors or receivers of the said tolls were thereby required to give *gratis*, if demanded, on payment of such toll."

The said act of Parliament was continued by another act, passed in the 36th year of Geo. 3, for that purpose (*a*), and again, for the term of twenty-one years, by another act, passed in the 1st and 2nd Geo. 4 (*b*).

The defendant, on the 6th July, 1821, and from thence, during the whole of the year 1822, was a toll-collector at, and keeper of, one of the turnpike-gates erected upon the road from *Sheet Bridge* to *Portsmouth*, by virtue of the said acts. The plaintiffs, during the same time, were the proprietors of two stage-coaches, each called the *Hero*, which travelled daily between *Portsmouth* and *London*, and *London* and *Portsmouth*, along the said road. The coach which left *Portsmouth* in the morning, on its way to *London*, was drawn by four horses through the gate kept by the defendant, to a place about two miles distant from the same, where the horses remained until the arrival of the coach which left *London* the same morning, on its way to *Portsmouth*, and then that last-mentioned coach, with different passengers and parcels, was drawn by the same four horses, in the evening of the same day, through the

same gate, to *Portsmouth*. In the morning of the said 6th July, the coachman who drove the coach from *Portsmouth* to *London*, paid the proper toll of sixpence for each of the said horses, and received a note or ticket of the day, denoting such payment; and in the evening of the same day, the other coachman, who drove the coach from *London* to *Portsmouth*, drawn on its return by the *same horses* as aforesaid, produced the said note or ticket of the day to the defendant at the said gate; but the defendant always demanded a further toll of two shillings, at the rate of sixpence for each of the horses drawing the said last-mentioned coach; and the last-mentioned coachman was obliged to pay the same to the defendant, in order that the horses and last-mentioned coach might be permitted, by him, to pass through the gate. The coaches and horses belonged to the plaintiffs, and the coachmen were their servants; but the coachman who drove the horses in the evening, was not the coachman who drove them in the morning. The money paid in the evening as aforesaid, was paid by the coachman as the servant, and on the account of the plaintiffs, and amounted, in the whole, to the sum of 19*l.* 16*s.*

On two days, namely, on the 11th and 15th June, 1822, *William Norris*, one of the plaintiffs, who was well known to the defendant to be one of the proprietors of the coaches and horses aforesaid, went with the coach and horses from *Portsmouth*, in the morning, through the gate, and paid the toll of six-pence for each horse, on each of the said mornings, and received the notes or tickets of the day, denoting such payments, and returned with the coach from *London*, and the same four horses, to the gate, in the evening of each of those days, and produced the said respective notes or tickets of the day to the defendant; but the defendant, on each occasion, demanded of the plaintiff the further toll of sixpence for each of the horses, and the plaintiff was, consequently, obliged to pay the same, and did pay the defendant the sum of two shillings,

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on each of those evenings, in order that the horses and coach might be permitted by him to pass through the said gate. On the two last-mentioned days, *Norris* (the plaintiff) went and returned with the coaches on the business of their respective journeys on those days, but did not drive the coach either from *Portsmouth* to *London*, or from *London* to *Portsmouth*, the coaches being driven, as usual, by their respective coachmen, his servants as aforesaid.

The question for the opinion of the Court was, whether the said sum of 19*l.* 16*s.* and the said two last-mentioned sums of two shillings, were legally payable for toll. If the Court should be of opinion that both the said sums were legally payable for toll, a verdict was to be entered for the defendant. But if the Court should be of opinion that the said sum of 19*l.* 16*s.* was not legally payable for toll, the verdict for the plaintiffs was to stand, and the defendant to account for all the sums received by him for toll, on the return of the *same horses* through the gate, from the 10th *July*, 1821, up to the time of signing judgment; and if the Court should be of opinion that the sum of 19*l.* 16*s.* was legally payable, but that the said two sums of two shillings were not legally payable for toll, then the verdict was to stand for the plaintiffs, but the damages were to be reduced to the sum of *four shillings*.

The case now came on for argument, when—

Mr. Serjeant *Wilde*, for the plaintiffs.—The only question is, whether the four horses passing through the gate in the morning, are subject to a second toll, on repassing in the evening, and drawing a different coach; and this will depend on whether the tolls be imposed on the coach, or on the horses drawing it. As the same horses passed and repassed through the gate, on their respective journeys, in the course of the same day, the payment of toll in the morning exempted them on their return in the evening, on the coachman's producing the ticket of the day. The

payment by the *same person*, in the exempting clause of the act, applies to the servant or agent of the proprietor of the stage, and cannot be confined to the identity of the coachman. The object of the statute was, not that the *same person* should pay the toll, but that, if it had been paid once for the horses, they might return on the same day, without being liable to a further charge; but it could never have been contemplated that they should be made subject to a second toll if driven by a *different* coachman.

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In *Gray v. Shilling* (a), where, by a local turnpike act, a certain toll was imposed on carriages, and not on the horses drawing them, and it was provided, that no persons, having paid such toll, and producing a ticket, should be again liable on the same day; and by a subsequent act, the old tolls were taken off, and others imposed, in respect of the horses drawing, and not on the carriages:—it was held, that toll having been paid on horses passing with a carriage, no new toll was demandable on the *same horses* returning on the same day, although drawing a *different* carriage. So here, the toll was imposed on the horses, and not on the carriage, and therefore the mere changing of the coach and coachman, cannot create a distinction between that case and the present. The learned Serjeant was proceeding with his argument, when the Court called on—

Mr. Serjeant Pell, for the defendant.—The toll, imposed by the act in question, is on the carriage, and not on the horses drawing it. The horses are mentioned and enumerated in the act, merely with a view of ascertaining the amount of toll to be demanded for the particular vehicle or carriage they might be drawing. The coach belonging to the plaintiffs, which passed through the gate in the morning, was not the same that passed through in the eve-

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ning, and though the same horses drew both coaches, the last could not be exempted from the payment of the accustomed toll. So, the horses could not be exempt, unless the ticket, directed by the act to be given, were produced by the *same* person that received it. The 9th section directs the tolls to be "demanded and taken of the person or persons attending any cattle or carriage;" and the subsequent exempting clause enacts, "that if any person or persons should have paid the tolls, by the act granted and ascertained, for the passing of any cattle or carriage through any turnpike erected by virtue of the act, the *same* person or persons, upon producing a note or ticket of the day, denoting such payment, should be permitted to pass and repass through the same gate or turnpike, with the same cattle or carriage, toll free, at any time or times during the same day." It is quite clear, that the horses are cattle within the meaning of that clause; but the toll is payable according to the description of the carriage drawn by such cattle; *viz.* for a coach or pleasure-carriage, three-pence; and for a stage-coach or machine, sixpence. Even supposing it were otherwise, in order to bring this case within the exemption of the act, it is necessary to shew that the horses and carriage were driven by the *same person*, both in passing and repassing; and a *different* coachman cannot be considered as the *same person*, though both were the servants of the same master or proprietor; and although it may be said, that the toll was payable by the proprietors, and was paid by their servants, and on their account; yet in order to bring them within the exempting clause, the second toll should be paid, on repassing in the evening, by the *same* coachman who received the ticket in the morning. In *Williams v. Sangar* (*a*), where a turnpike act imposed a toll on every carriage and every horse passing through the gate,

and exempted any person from paying more than once in a day, for passing or repassing with the same carriage or horse, and exempted the traveller from paying, a second time in the day, for the passage of the same carriage, though drawn by different horses, being the same in number; and it was provided, that in all cases of carriages travelling for hire, the traveller or passenger therein should be considered as the person paying the toll, and that such payment should not exempt such carriages repassing with a different traveller or passenger;—it was held, not to extend to stage coaches;—the carriage itself not being then hired by the respective passengers, but only a conveyance by it;—and therefore, that such stage-coaches were freed from the payment of a second toll in the day, although returning with different passengers and different horses, the horses being the same in number: and although the Court there drew a distinction between carriages of a public nature, and those used for private purposes; and Mr. Justice *Grose* said (a), “that with respect to a stage-coach, the carriage itself is under the control of the owner or his servant, who pays the toll;” and the payment by the servant might be considered as payment by the master: yet that case is distinguishable from the present, as here the words, “the same person,” must be understood exclusively to mean the person who procured the ticket in the morning. In *Harrison v. Brough* (b), where a turnpike act imposing tolls on horses, &c., contained exemptions in favour of “cattle going to or returning from pasture,” and “horses attending cattle returning from pasture,” it was held, that a horse, ridden by the owner of the cattle at pasture, in going to fetch them thence, did not come within either of the exemptions; the object of the Legislature being, that when cattle were going to, or returning from, pasture, the horse of the person attending them should be exempt.

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ed from toll; and Lord *Kenyon* there said, "the question is, whether a horse going to fetch cattle, were attending the cattle at the time. Barely stating the question, is answering it. When the horse is attending the cattle, the turnpike-man can see what is passing, and of course can judge whether the party be entitled to the benefit of the exemption; but he has no means of knowing whether a horse be going to fetch cattle. If this were allowed to be an exemption, it would open a great door to fraud on the turnpike-men; I am, therefore, of opinion, that the plaintiff is neither within the words nor the spirit of either of these exemptions." So here, the person producing the ticket in the evening, must be the same to whom it was delivered in the morning. And in the late case of *Loaring v. Stone* (a), where a turnpike-act imposed a scale of tolls upon horses only, drawing or not drawing carriages, respectively, as the case might be; and by a clause of exemption, it was provided, that no person should be liable to pay toll more than once, for passing and repassing the gates on the same trust, at any time, in any one day, with the same horses and carriages, through the same toll-gate, but that every person having paid toll once, and producing a ticket, denoting the payment of such toll, should afterwards pass and repass, with the same horses and carriages, toll free, during the same day, through the same gate where such toll was paid; and a stage-coach, drawn by four horses, having passed through a gate on the trust, and paid the toll in the morning, and in the evening of the same day, the same horses, drawing a different coach, called by the same name, belonging to the same proprietors, and driven by the same coachman, but carrying different passengers and parcels for hire, passed through the same gate:—it was held, that a second toll was payable in respect of the last-mentioned carriage and horses, so

(a) 2 Barn. & Cres. 515; S. C. 3 Dowl. & Byl. 797.

passing through the gate. Here, therefore, if the same coachman, or even the proprietor himself had driven the coach both in going and returning, as it was a different coach from that for which toll was paid in the morning, a new and distinct toll was payable on its return in the evening, as the horses and carriage were each the subject of a specific toll, and the main injury done to a turnpike road, arises from the wheels of the different carriages which pass over it, and not from the horses drawing them. The case of *Gray v. Shilling*, is altogether distinguishable from the present, as the subsequent act imposed tolls in respect of the horses drawing, and not on the carriages, as in the original act.

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Lord Chief Justice BEST.—It has frequently been declared from the bench, and I fully concur, that those who seek to exact tolls, through the medium of the Legislature, can only be entitled to them when the statutes granting them are couched in plain and unequivocal language; and in the construction of these acts we must look to the strict words, and construe them according to their plain meaning, with reference to the subject matter. The framers of the acts have the receivers of the tolls before them, and not the payers; and the former should not only shew an express right to demand or take tolls, but the words of the particular statute by which they are imposed, must, in themselves, be so clear and express as to render it unnecessary for the Court to look into any decided case on the subject. At all events, it is incumbent on us to protect the interests of the parties from whom tolls are exacted. In this case, it appears to me, that the defendant had no pretence whatever to demand the tolls in question. I was at first not aware that it was intended to be argued that the toll was imposed on the carriage instead of the horses drawing it, but thought that the only question to

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be raised was, whether, in order to claim the exemption by the production of the ticket, it should be shewn by the *same person* in the evening, to whom it was given, on payment of toll, in the morning. Now, there can be no doubt or difficulty as to that; for although the coachmen tendered the toll to the defendant, it was their masters who paid it, and if it had been paid improperly, they alone, and not the coachmen, could recover it back, in an action for money had and received. The tolls, therefore, were paid by the coachmen on account of the plaintiffs, as proprietors of the coach, by whom it was conducted and regulated throughout the whole of the journey, although it was the duty of their servants to take due care as to the proper conveyance of the passengers and luggage. At all events, the master or proprietor of a coach must be considered as constructively present, for several purposes, and he is liable for the negligence or misconduct of his servants and coachmen. It has been insisted, however, that the toll is imposed on the coach, and not on the horses drawing it; and therefore, as two different coaches passed through the gate on the same day, the defendant was justified in demanding double toll. But I am clearly of opinion, that by the terms of this act, the toll is imposed on the horses and not on the coach; if it were otherwise, the argument for the defendant must have prevailed. Although it had not been expressly laid on the horses drawing, yet, if authority were wanting, the judgment of the Court of *King's Bench*, in the late case of *Loaring v. Stone*, appears to me to decide the question. Mr. Justice *Bailey* there said, "the enacting clause imposes, first, a toll of 4*d.* upon every horse, drawing in any coach, chariot, &c.; second, a similar toll upon every horse, drawing singly any carriage whatever. The toll is, therefore, imposed upon the horse, and not upon the carriage." So, here the words of the acts are, "for every horse, drawing any coach or other pleasure-carriage,

3d., but if drawing any stage-coach or machine, 6d."—Those words, however, were introduced in that act, but they are not to be found here; and if the toll had there been imposed on the horses only, the judgment of the Court would have been different. And the 18th section provided, that no person should pay toll more than once, at any one gate, for passing and repassing, in any one day, with the same horse, or horses, *and* carriages; and the word "carriage" occurs several times in that proviso, accompanied with such other words, as clearly shewed that there must be both the *same* horses and the *same* carriage, to entitle a party, passing the gate a second time, to the exemption. Here, however, the exemption extends to the *same* person passing and repassing, with the same cattle *or* carriage; the toll is not imposed on the carriage, but on the horses drawing it; and the distinction is expressly taken, in the 7th section, with respect to waggons, wains, and carts; for, there, the toll is laid on the vehicle, and not on the animals drawing it. Although it has been said, that the effect of that section must be limited in its operation, as the tolls were to be paid by the person attending any cattle or carriage, and that the exemption only extends to the *same* person, who shall have paid toll; yet, here, the person attending the cattle or carriage was the coachman; and as the toll was imposed on the horses and not on the coach, the case of *Gray v. Shilling* is decisive to shew, that the toll having been once paid for the horses, no new toll could be demanded, on their returning, the same day, although drawing a different carriage; and Lord Chief Justice *Dallas* there said (*a*), "even if the case of *Williams v. Sangar* had not been decided, I should have thought, from the construction of both these statutes, that horses having drawn a carriage through the gates in question, for which toll had been paid, would not be liable to pay a second time on the same day, although they repass-

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(*a*) 4 B. Moore, 378.

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ed through the gate with a different carriage." That appears to me to be precisely in point; and as the rest of the Court concurred with his Lordship, I am of opinion that the plaintiffs are entitled to recover to the extent of the verdict found for them at the trial.

Mr. Justice PARK.—I concur with his Lordship; and my opinion is founded on the particular construction of the statute now before us. Two points have been urged: the one, that the toll is imposed on the carriage, and not on the horses; and the other that the exemption extends only to the *same* person who paid the toll, who alone, it is contended, can repass through the gate, on producing the ticket of the day. But it is quite clear that the toll, in this case, is imposed on the horses drawing any pleasure-carriage or stage-coach, and in the case of a waggon, wain, or cart, on the carriage itself, and not on the animals drawing it. The Court decided the case of *Harrison v. Brough* for the purpose of preventing a fraud on the toll-gate-keeper; for, if the horse were not attending the cattle at the time, he could not know whether or not it were going to fetch them. The case of *Learing v. Stone* is also different from this. Mr. Justice Bayley there drew the distinction, and said (a), "as no toll was imposed, by the enacting clause, upon the 'carriage,' there could be no reason for introducing that word into the proviso, unless it were intended to confine the exemption in respect of horses drawing carriages, to the *same* horses drawing the *same* carriage;" and Mr. Justice Holroyd said (b), "the word 'carriage' occurs several times in the proviso, and accompanied with such other words as shew clearly that there must be both the *same* horses and the *same* carriage, in order to entitle a party, passing the gate a second time, to the exemption." Here, however, the words in the proviso, containing the exemption, are "with the *same* cattle *or* carriage;" and the case of *Williams v.*

(a) 2 Barn. & Cres. 519.

(b) Ibid.

**Sanger** is expressly in point, to shew, that, if the owner of a stage-coach, or his servant, have paid the toll once in the day, he is thereby exempted from paying it again, although returning with different passengers and different horses, the horses being the same in number.

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**Mr. Justice BURROUGH.**—The persons who framed the act in question must be taken to have known the usage of the road; and if an additional toll might be imposed on a different carriage, though drawn by the same horses and returning on the same day, it would increase the sum raised by the tolls to so enormous an amount, that I should much doubt whether the Legislature would have allowed the act, so framed, to pass. All that was intended was, that a party should only pay toll once in the same day for the same horses drawing a stage-coach; and although the coach might not be identically the same, it is immaterial. The coachmen were employed by the same proprietors, who were responsible for their acts, and by whom the tolls were paid.

**Mr. Justice GASELEE concurring—**

*Postea* to the plaintiff.



**Sir JOHN TYRNELL, Bart. v. MARSH.**

*Tuesday,*  
*May 3rd.*

**THIS** was an action of *assumpsit*, to recover the amount of the purchase-money of an estate, called *Collier's Hatch*, the husband for life; remainder to the use of the wife for life; remainder to the children of the marriage; and, in default of issue, to the use of such person as the wife should appoint; and for default of such appointment, to the use of the right heirs of the survivor of the husband and wife, for ever; with power to the husband and wife to charge the estate; and a power to trustees, in whom the legal estate was vested, to sell, by the direction, and with the approbation, of the husband and wife, or the survivor. The husband and wife borrowed a sum of money, by way of annuity; created a term of 1000 years; and levied a fine to *G.*, in fee, with a deed declaring the uses to be "in trust to secure the regular payment of the annuity, and for corroborating and strengthening the said term;"—Held, that the fine did not operate to extinguish the power of the wife to consent to a sale of the settled estates, so as to prevent an exercise of the power of sale, by the trustees.

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in the county of *Essex*, which the defendant had bought of the plaintiff.

At the trial, before Mr. Baron *Graham*, at the last *Spring Assizes*, at *Chelmsford*, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:—

By a marriage settlement, dated the 27th *May*, 1775, the estate in question, subject to a charge of 1500*l.*, secured by a term of one thousand years, was limited to the use of *Francis Stuart*, and his assigns, for life, *sans waste* (with a limitation to *William Tod* and *Thomas Cheap*, and their heirs, during the life of the said *Francis Stuart*, in trust, to support contingent remainders); remainder to the use of *Mary Stuart*, and her assigns, for life, *sans waste*, with a limitation to the said trustees, and their heirs, during her life, in trust, to support contingent remainders; remainder to the children of the marriage, in such shares as *Francis Stuart*, and *Mary* his wife, should, by deed or will, appoint; and for default of such appointment, to the use of the children of the marriage, as tenants in common in tail, with cross-remainders; and for default of such issue, to the use of such person as *Mary Stuart*, notwithstanding her coverture, should, by deed, attested by two witnesses, or by will, appoint; and, for default of such appointment, to the use of the right heirs of the survivor of the said *Francis* and *Mary Stuart*, for ever. And it was provided, in and by the said indenture, that it should be lawful for *Francis* and *Mary Stuart*, during their joint lives, or the life of the survivor of them, to charge the estate to the extent of 2000*l.*. And it was further provided, that it should be lawful for the said *William Tod* and *Thomas Cheap*, and the survivor of them, and the heirs of such survivor, at any time or times during the joint lives of the said *Francis Stuart*, and *Mary* his wife, or during the life of the survivor of them, by the direction,

and with the approbation, of the said *Francis Stuart*, and *Mary* his wife, or of the survivor of them, to be testified by any writing or writings under their, or either of their, hands and seals, to be attested by two or more credible witnesses, to make sale of, or to convey in exchange, as therein mentioned, all or any part or parts of the messuages, farms, lands, tenements, or hereditaments, which were thereby limited to such uses as aforesaid, with their appurtenances, to any person or persons whomsoever, for any such price or prices in money, or for such other equivalent in lands and hereditaments, as to the said *William Tod* and *Thomas Cheap*, or to the survivor of them and his heirs, should seem reasonable; with full power, upon payment of the money which should arise by any such sale of the said premises, or of any part or parts thereof, to give and sign proper receipts for the same, which receipts should be a sufficient discharge to purchasers.

*Francis Stuart*, and *Mary* his wife, had one child, a daughter. *Mary Stuart* survived her husband, and afterwards married *James Stuart*.

By an indenture, of *March*, 1782, creating a term of one thousand years, reciting the indenture of 1775, and the death of *Francis Stuart*, in 1777, *Mary Stuart*, with the consent of her husband, *James Stuart*, charged the estate with 2000*l.*, borrowed of one *Alexander Wood*, to whom the term was granted as a security, with a proviso to make it void, in case of the repayment of that sum to him, with interest. By an indorsement, on the back of this deed, bearing date the 1st *April*, 1783, *Wood* assigned this term to *Elizabeth Gordon*, of whom *Stuart* and his wife had then borrowed 2000*l.* And by indentures of lease and release, of five parts, of the same date, and to which, among other persons, *Stuart* and his wife, the said *Elizabeth Gordon*, and one *James Graham*, were parties, stating that 1000*l.* only, and not 2000*l.* had been paid by *Elizabeth Gordon*; and that she had paid it in purchase

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of an annuity of 95*l.*, to be paid by *Stuart* and his wife; and reciting that *Mary Stuart* was entitled to the reversion of the premises, expectant on the death of her daughter, by her first husband *Francis Stuart*, under age, and without issue; and that, for better securing the said annuity of 95*l.* to *Elizabeth Gordon*, the said *James Stuart* and his wife had agreed to grant this reversion to *Graham* and his heirs, in trust for *Elizabeth Gordon* and her assigns; the premises were conveyed to *Graham* in fee, subject to the estate of *Mary Stuart's* daughter therein, and to the original charge of 1500*l.*, upon trust for *Elizabeth Gordon* and her assigns, to secure the regular payment of the annuity; and *Stuart* and his wife covenanted to levy a fine of the premises, to enure to the use of *Graham* in fee, for corroborating and strengthening the said term; and, subject thereto, to *Graham* and his heirs, upon the trusts before mentioned. *Stuart* and his wife duly levied a fine, *sur conusance de droit, &c.* to *Graham*, as of *Easter Term, 28 Geo. 3.* of the premises in question, in pursuance of the covenant contained in the deed of 1783. In *March, 1793*, by indentures of lease and release of ten parts, attested by two witnesses, and to which *Tod* and *Cheap*, (the two trustees for sale, appointed in the deed of 1775,) *Elizabeth Gordon*, *James Graham*, *James Stuart*, and his wife, and various other persons, who had joined in executing the before-mentioned indentures, were parties; and reciting the indentures of 1775, 1782, and 1783, and the fine levied in pursuance thereof, and the annuity payable to *Elizabeth Gordon*; it was witnessed, that in consideration of the sum of 8670*l.*, paid by *Sir William Smyth*, and by virtue, and in execution of the power reserved to *Mrs. Stuart*, by the indenture of 1775, but subject, and without prejudice to the aforesaid power of sale and conveyance, limited to *Tod* and *Cheap*, and the exercise thereof, and the uses thereby created, *Mrs. Stuart* directed and appointed, that if her daughter should die without leaving

issue of her body, then, and after her daughter's decease, and such failure of issue, the premises should remain, and the indenture of 1775 should operate, to the uses thereafter limited; she then directed *Tod* and *Cheap* to sell and convey the premises to the uses thereafter limited, and to exercise the power of sale given them by the deed of 1775, and the fine levied in pursuance thereof: and *Tod* and *Cheap* did thereby sell and convey the premises to the uses thereafter limited; and *Stuart* and his wife, *Tod* and *Cheap*, and *Graham*, with the consent of *Elisabeth Gordon*, according to their respective interests, granted, bargained, sold, assigned, released, and confirmed the premises in question, to the said Sir *William Smyth* and his heirs, to hold to the several uses thereafter mentioned, which were such as he, the said Sir *William Smyth*, should appoint, with the usual trusts to bar dower; and, for default of appointment, to the heirs and assigns of the said Sir *William Smyth*, to whom *Elisabeth Gordon* also assigned the residue of her term of 1000 years, and remitted the annuity of 95*l*. Sir *William Smyth* devised the premises, by will, to the plaintiff and another, in fee, in trust to sell, and died in *May*, 1823; and shortly afterwards the plaintiff contracted to sell them to the defendant.

The question for the opinion of the Court was, whether the fine levied by *James Stuart*, and *Mary* his wife, in Easter Term, 23 Geo. 3, operated to extinguish or destroy the right or power of the said *Mary Stuart*, to consent to a sale of the settled estates, under the power for that purpose, contained in the indenture of the 27th *May*, 1775, so as to prevent an exercise of such power of sale by the trustees of the same indenture. If the Court should be of opinion, that the fine did not so operate, then the verdict found for the plaintiff was to stand; but if they should be of opinion that the fine did so operate, then a verdict was to be entered for the defendant.

The case now came on for argument, when—

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Mr. Serjeant *Bosanquet*, for the plaintiff, contended, that the fine did not operate to extinguish or destroy the power of *Mary Stuart*, to consent to a sale of the settled estates, under the power contained in the indenture of *May*, 1775, so as to prevent an exercise of such power of sale by the trustees; and he relied on the case of *The Earl and Countess of Jersey v. Deane* (*a*), as being precisely in point;—where, by a marriage settlement, dated *December*, 1806, certain manors and lands were limited to the husband for life; remainder to the wife for life; remainder to the use of the first and other sons of the marriage successively in tail male; remainder, in case the wife should survive the husband, to her, in fee; but if she should die in the life-time of her husband, remainder to the daughters successively, in tail male; remainder to the use of such persons related by blood or consanguinity, and in such estates or interests, and in such manner, and charged with such sums of money, in favour of such persons so related, as she by her will might appoint; and, in case of no such appointment, to her in fee. The settlement also contained a power for the trustees there named, at the request, and by the direction, of the husband and wife, or the survivor, to sell or exchange the settled estates, and, for that purpose, to revoke all and any of the uses contained in the settlement; and also a covenant by the husband, for further assurance on his part, and that of his wife, and all persons claiming under him. In pursuance of this settlement, certain fines were levied. By deed, dated *March*, 1807, reciting the settlement, and the fines levied in pursuance thereof, and the limitations therein contained, and further that the wife was desirous of acquiring an absolute power of appointment over the manors, &c. comprised in the settlement, in the event of her surviving, or dying in the life-time of her husband, and there being a general failure

of issue of her body, inheritable to the manors, &c. under the settlement, the husband and wife covenanted to levy certain fines, *sur conuance de droit come ceo*, with proclamations, to *J. G.* and his heirs, of all the manors, &c. comprised in the settlement: which fines were to operate, and to be taken to operate, first, for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee simple, and, subject thereto, to the use of such persons, &c., as the wife by will or deed might appoint. In pursuance of this latter deed, several fines *come ceo* were levied by the husband and wife:—It was held, that under these circumstances, these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband and wife, and the survivor of them, to request and direct a sale or exchange of the settled estates, under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees. In that case, all the previous authorities on the subject were referred to, and commented on; and the Vice Chancellor has since acted on the above decision of the Court of *King's Bench*. The powers, both in that case and in the present, are similar in their nature; and here, the deed to lead the uses, of the 1st April, 1783, was executed for a specific purpose, *viz.* to secure the regular payment of the annuity to *Elisabeth Gordon*; and *Stuart* and his wife covenanted to levy a fine accordingly, and the interests of all parties were provided for, whose interests it was material to preserve. The intention of the parties, must, at all events, be regarded, in order to ascertain what was the object of levying the fine, and it is evident, that it was done in pursuance of the covenant contained in the deed to lead the uses, and the Court will modify it accordingly. It is, therefore, clear that the power for the trustees to sell, was not touched by the fine, and that the only effect of it was, to secure the annuity to *Elisabeth Gordon*; and that having been satisfied or determined, *Mary Stuart*

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was to be placed in the same situation in which she stood before the deed was executed or the fine levied.

Mr. Serjeant Tuddy, for the defendant.—Although in *Herring v. Brown* (*a*), it was established, that the operation of a fine was to be controlled by the agreement of the parties, and that the Court would modify its effect, so as to further their intent; yet a fine alone, without a declaration of uses, has the effect of extinguishing or destroying all antecedent powers, except those expressly reserved by the deed to lead such uses; and as Sir *Matthew Hale* observed (*b*), “fines and feoffments do ransack the whole estate, and pass, or extinguish, &c. all rights, conditions, powers, &c. belonging to the land, as well as the land itself;” and in the deed to lead the uses of the fine in question, no intent is expressed, to preserve the power of the trustees; they were not the comisors, nor was it material that they should be so, the power not being in them alone, nor to be exercised at their will, nor for their own benefit; but it was to be put in motion by *Stuart* and his wife, or the survivor, who alone were to direct the uses, and the particular manner in which the power was to be exercised. The objects of the deed to lead the uses were, to secure the payment of the annuity to *Elisabeth Gordon*, and to limit the uses to *Graham* and his heirs, so as to convey a fee to him; and although it has been said, that it was merely intended to operate as a further security for the annuity, yet the Court cannot look to resulting trusts. Besides, in the deed no allusion whatever is made to the preservation of any power, which distinguishes this case from that of *The Earl of Jersey v. Deane*, where there was an express saving, viz. “for corroborating the several uses, trusts, &c., limited and contained of and concerning the said manors, and expressed by the settlement, antecedently to the several limitations therein re-

(*a*) Carth. 22; S. C. 2 Show. 185; 1 Vent. 371.      (*b*) 1 Vent. 228.

spectively contained." Here, however, no such object is expressed: and it would be contrary to the effect of the indenture, if the power of sale should be outstanding in the trustees; and the intention to give *Graham* a fee would be altogether frustrated, as they might have executed the power under the direction of *Stuart* and his wife (the consumers) notwithstanding the conveyance to him. This is not like the case of a will, which must be construed according to the apparent intention of the testator; for here the whole deed must be taken together, and the nature of the estate, as well as the objects the parties had in view, and their means of effectuating those objects, must be considered; and their principal object undoubtedly was, to convey a fee to *Graham*. There are numerous authorities by which the principle is established, that a fine, uncontrolled by any agreement of the parties, or an intent to do so, has the effect of extinguishing all antecedent powers. In *Herring v. Brown*, where a party, seized in fee of lands, made a settlement to trustees and their heirs, to the use of the settlor for life, remainder to his brother in tail, with a power of revocation, and afterwards levied a fine without any declaration of the uses precedent to the levying it; it was at first held, that, by levying the fine, he had extinguished the power of revocation, and that a subsequent deed, containing a declaration of uses, was of no effect: but that judgment was afterwards reversed, on the ground that the fine and the deed declaring the uses were to be considered as one and the same conveyance. In *West v. Berney* (a), and *Smith v. Deas* (b), the distinction between powers simply collateral, and powers in gross, was completely set at rest. A power of sale may be similitated to a power of revocation; and in *Digges's* case (c), where a person, seized in fee, covenanted to stand seized to the use of himself for life, remainder over, reserving to

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(a) MS. H. T. 1819. (b) MS. H. T. 1819. (c) 1 Rep. 173.

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himself a power of revocation by deed indented and enrolled;—the first deed was revoked, but before the deed of revocation was enrolled, he levied a fine of the lands;—it was held, that the fine, being levied before the enrolment of the deed of revocation, until which time the revocation was imperfect, had extinguished the power. And in *Albany's* case (*a*), where a feoffment was made of two acres, to the use of *A.* for life, remainder to *C.* in tail, remainder to *D.* in fee, with a proviso that if *E.* should die without issue, then *A.* might revoke, &c., and declare new uses; *A.* made a feoffment of one of the acres to *F.*, and afterwards revoked the first, and limited new uses; it was held, that, by the feoffment, the power to revoke and to limit new uses was extinguished. That case, therefore, established the principle, that powers relating to land, whether appurtenant, or in gross, may be destroyed by a release to any person, having an estate of freehold, in possession, remainder, or reversion, in the lands to which the power relates. And here, as the object was to convey an estate in fee to *Graham*, and, as no intent was expressed to preserve the power of sale by the trustees, the fine operated so as to extinguish their power to sell, as well as to destroy the right of *Mary Stuart* to consent to the sale of the settled estates, under the power in question.

**Lord Chief Justice Best.**—The question in this case arises on the construction of certain deeds, and other instruments, which are therein recited or set out; and when their substance and meaning are looked at, there appears to me, to be no difficulty whatever. The action was brought to recover the amount of the purchase money of an estate, which the defendant had bought of the plaintiff: or, in other words, the latter sought to recover dam-

(*a*) 1 Rep. 111; Sugden on Powers, 3d. Ed. 80, 81.

ages for a breach of agreement, by the defendant, in not completing the purchase of the estate. The plaintiff insists that he has a good title; and that depends on the question, whether the power of the trustees to sell had been destroyed by any act of Mrs. *Stuart*, or her husband. The power was created by a deed of 1775, on the first marriage of *Mary Stuart*; and, by that indenture, certain powers were vested in her and her husband, one of which was, that two trustees might sell the estate, by the direction, and with the approbation, of the husband and wife, or the survivor of them; and, as she survived her husband, the power of sale could only be executed under her direction. After the death of her husband, Mrs. *Stuart* intermarried, and she and her second husband raised money, by way of annuity, from one *Elizabeth Gordon*, subject to this power; and to secure the repayment of the principal sum advanced, a fine was levied, according to a deed drawn up to lead the uses. It is unnecessary to consider what would be the effect of a fine without any such deed; if it were, it might be necessary to look into *Digges's* case, and *Albany's* case, and see whether the doctrine therein laid down can now be supported. But all that those cases decide, is, that if a fine be levied without a deed to declare the uses, it operates as an extinguishment of all antecedent powers, or as Sir *Matthew Hale* justly observed, "it ransacks the whole estate." But here, there was a deed to lead the uses, and we, therefore, need not refer to an earlier decision than *Herring v. Brown*, as reported in *Shower and Cartew*, which must be considered as of the highest authority. There, a tenant for life, with power of revocation, levied a fine, and then, by a deed, executed a short time after, declared the uses of it; and the deed was executed in the manner required by the power. The Jury found the fine to have been levied with an intent to make partition, and to the uses declared in the deed; and after a most able argument, the Court of *King's Bench* determined, that the fine had destroyed

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the power. From this judgment, however, there was an appeal to the *Exchequer Chamber*, where it was reversed, on the ground, that the fine and deed were but one and the same conveyance, and that both together were an execution, and not an extinguishment, of the power. That decision is not only consistent with sense and justice, but has been confirmed by subsequent cases, and particularly by *Doe d. Odiarde v. Whitehead*(a), and the doctrine established by all the authorities is, that although the levying of a fine displace existing interests; yet, if there be an accompanying deed, shewing the intent and object for which it was levied, it shall not operate to destroy powers, which it was obviously the intention of the parties to retain; and that several conveyances may be considered as one assurance, for the purpose of carrying such intention into effect. What then was the intent of the parties in levying the fine in this case, and what is its effect? It was levied by Mrs. *Stuart* and her second husband, for the sole purpose of securing the payment of the annuity to *Elizabeth Gordon*: and although it has been said that it conveyed the estate to *Graham* and his heirs; yet the fee was not conveyed to him as a separate and independent estate, but only for the subordinate purpose of securing the payment of the annuity. *Graham's* estate was only to exist during the life of the grantee of the annuity; and, on her death, it was to revert to Mrs. *Stuart* and her husband, and to vest in them accordingly, subject to the terms of the original settlement. It has been further said, that the parties must apply to a Court of Equity for relief, as we cannot take notice of a resulting trust; but, where an estate is conveyed by *A.* to *B.* during the life of *C.*, it is not necessary for *A.*, on the death of *C.*, to apply to a Court of Equity, and no conveyance is necessary, as the resulting trust reverts to the former possessor. So, here, on the death of *Eliza-*

Elizabeth Gordon, the interest of Mrs. Stuart attached; and the estate revested in her and her husband, under the operation of the statute of uses. Although it has been attempted to distinguish this case from that of *The Earl of Jersey v. Deane*, as it does not appear by the deed to lead the uses, that it was the intention of the parties that the fine should only operate as a security for the annuity; yet, taking the whole of the instrument together, enough appears to shew, that it was not the intention of the parties that the fine should operate so as to destroy the power; and, if effect be given to that intent, it will not prevent an exercise of the power of sale, by the trustees appointed under the original settlement.

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Mr. Justice PARK.—I am of the same opinion. The only difficulty has arisen from the number and length of the deeds which are set out in the case; and when that of the 1st April, 1783, by which the uses of the fine were declared, is looked at, the obscurity in which the case seemed to be enveloped is completely removed. The intent of the parties must be first considered; and although a fine alone, and uncontrolled, without a deed declaring the uses, will extinguish a power; yet it is not so, where there is a deed declaring the intention of the parties. That principle was fully established in *Herring v. Brown*: and in *Doe d. Odiarne v. Whitehead*, where there was a covenant, in a release from a tenant in tail, to levy a fine to the use of the releasee, the fine and release were holden to be but one assurance. There is nothing in this case to shew that the parties had any other object or intent than to protect or secure the payment of the annuity to Elizabeth Gordon, and when the trust in her favour was executed, the estate reverted to Mrs. Stuart, subject to the provisions contained in the original settlement.

Mr. Justice BURROUGH.—In every fine, the comisor

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acknowledges that the lands therein comprised are the lands of the conusee by the gift of the conusor. A fine, therefore, sweeps away all the conusor's title to the estate, unless there be a deed to declare or lead the uses. But when there is such a deed, it is the same as if the uses were inserted in the fine itself. The two constitute one conveyance, and must receive one and the same construction. Difficulties have sometimes arisen, where the deed has not been executed immediately on the levying of the fine; yet it has been held, that it would be unreasonable to make a forfeiture or extinguishment of a right, merely by relation, which is but *fictio juris*. Here, however, the deed declares the intent for which the fine was levied, and appears to have been executed at the time.

Mr. Justice GASELEE concurred.

*Postea* to the plaintiff.

Tuesday,  
May 3d.

#### DORVILLE v. WHOMWELL.

THE defendant in this cause, having been arrested upon a *capias ad respondendum*, and given a bail-bond to the Sheriff of Yorkshire, a rule was obtained by Mr. Serjeant Bosanquet, on a former day in this Term, calling on the plaintiff to shew cause why such bond might not be delivered up to be cancelled, on the defendant's entering a common appearance. He founded his motion on affidavits, which stated, that a *capias ad respondendum*, returnable in fifteen days of Easter, with an *ac etiam* to hold the defendant to bail, for 100*l.* and upwards, was issued into Middlesex, founded on an affidavit of debt, sworn before the slarer for Yorkshire; on which, another *capias* was issued into the latter county, instead of a *testatum*; whereupon the defendant was arrested:—Held, that this was irregular, as a fresh affidavit should have been sworn before the slarer for Yorkshire.

deputy filacer, and filed in the filacer's office for that county; that the defendant not being found there, but being resident in *Yorkshire*, the plaintiff obtained an office copy of the affidavit of debt, certified by the filacer for *Middlesex*, which he lodged with the filacer for *Yorkshire*, and thereupon a second *capias* was issued into the latter county, upon which the defendant was arrested, and gave the bail-bond in question. The learned Serjeant contended, that, under these circumstances, the arrest was irregular, as the plaintiff ought to have filed a new affidavit of debt with the filacer for *Yorkshire*; and that the mere office copy of the affidavit, as certified by the filacer for *Middlesex*, was insufficient for that purpose; and he cited the case of *Anderson v. Hayman* (*a*), where, on an affidavit of debt, sworn before, and filed with, the filacer for *Devon*, a *capias ad respondendum* issued to the sheriff of that county, against the defendant, who, not being found there, an office copy of the affidavit was filed with the filacer for *London*, on which another *capias* issued, directed to the sheriffs of *London*, under which the defendant was arrested,—it was held, that this was irregular, and that an affidavit should have been sworn before the filacer for *London*; as also that of *Dalton v. Barnes* (*b*), where it was held, that a special *capias*, issued upon an affidavit sworn at the Bill of *Middlesex* office, was irregular.

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Mr. Serjeant *Vaughan*, now shewed cause, and relied on the case of *Boyd v. Durand* (*c*), where it was held, that if a plaintiff proceed by a second original *capias*, instead of a *testatum capias*, a second affidavit to hold to bail was not requisite; and it was doubted, whether, in such a case, it were necessary to file an office copy of the affidavit, with the filacer for the second county, Mr. Justice *Lawrence*

(*a*) 2 B. Moore, 192.

(*b*) 1 Mau. & Selw. 230.

(*c*) 2 Taunt. 161.

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saying, "as to the practice regarding the issuing of a *testatum capias*, the act of Parliament (a) does not say that more than one affidavit shall be made; and the practice has prevailed of sending a copy to the filacer of another county, who thereupon makes out a *capias*."

Lord Chief Justice BEST.—The original affidavit of debt was filed with the filacer for the county of *Middlesex*, and the plaintiff, instead of issuing a *testatum capias* into *Yorkshire*, where the defendant resided (he not having been arrested on the original *capias*), sued out a new *capias* into the latter county, on obtaining an office copy of the affidavit, certified by the filacer for *Middlesex*, which he lodged with the filacer for *Yorkshire*. This was clearly irregular, according to the late case of *Anderson v. Hayman*, as reported by *Moore*, which not only appears to me to be founded in good sense, but is an authority to which we are bound to adhere. The report of that case in *Taunton* is incorrect; for the Court decided on the grounds stated by *Moore*. When a defendant cannot be found in the county into which the original *capias* issued, and it be intended to issue a new *capias* into another county, a second affidavit must be sworn and filed before the filacer for the county into which the new *capias* is to be issued.

Mr. Justice PARK.—The case of *Boyd v. Durand*, is distinguishable from the present, for there the same person executed the office of deputy filacer for both the counties, *viz.* for *Middlesex* and for *Surrey*; and in *Dalton v. Barnes*, it was contended, that the practice was, for the filacer, upon either the original affidavit, or an office copy of it, being transmitted to him, to issue his writ; but the Court there said, that such could not be the practice, for that an affidavit

made for one specific object, could not be transferred to another, and that perjury could not be assigned on the office copy. I perfectly agree with the reasoning of the Court in *Anderson v. Hayman*, as that case is reported in *Moore*.

Mr. Justice BURROUGH, and Mr. Justice GASELEE, concurring—

Rule absolute, with costs.

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WILLIAMS v. COOKE.

Tuesday,  
May 3rd.

THE plaintiff having obtained a verdict against the defendant, and entered up judgment, and sued out execution thereon, Mr. Serjeant Pell applied for a rule calling on the former to shew cause why the sum of 171*l.* 2*s.*, the amount of the sum levied, should not be impounded in the hands of the sheriff, until an action, brought by the defendant against the plaintiff, as acceptor of a bill of exchange for 200*l.*, and of which the defendant was the holder, had been determined. The learned Serjeant submitted, that the Court might, in the exercise of their equitable jurisdiction, grant the application in the terms as prayed.

The plaintiff, having obtained a verdict against the defendant, entered up judgment, and sued out execution against his goods,—the Court refused to allow the sum levied to be impounded in the hands of the sheriff, until an action, which the defendant had commenced against the plaintiff, as the acceptor of a bill of exchange, had been determined.

Lord Chief Justice BEST.—This is a motion of the first impression, and I do not think that we have, as has been said, a discretionary power to accede to the defendant's application. The plaintiff has obtained a verdict against the defendant, on which judgment has been entered up, and execution issued, and we cannot prevent him from obtaining the fruits of his execution; we might, however, protect the sheriff, if he felt any difficulty as to paying over the amount of the levy. It has been argued, that, as the plaintiff is indebted to the defendant, as the acceptor of a bill of exchange, in a larger sum than that levied and

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now remaining in the hands of the sheriff, that sum might be impounded until the action pending on the bill has been determined. But the ground of the motion is in the nature of a set off, and although mutual judgments may be set one against the other, yet here there is no mutuality, the defendant not having even obtained a verdict in the action brought by him against the plaintiff. It therefore appears to me, that there is no colour for this application.

The rest of the Court concurring—

Rule refused.

*Tuesday,  
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**FAHRBRODH v. SOLLIERS.**

A RULE  *nisi* having, on a former day in this Term, been obtained by Mr. Serjeant *Wilde*, that the bail-bond, given by the defendant, on his being arrested at the suit of the plaintiff, in this cause, might be delivered up to be cancelled, and a common appearance entered, on an affidavit which stated that he was described in the *capias* by the name of *N. A. Solliers*, the whole of his Christian name not being set out, and that he had signed the bail-bond in the same manner.

Mr. Serjeant *Vaughan* now shewed cause, on an affidavit, which stated, that the action was brought against the defendant, on a bill of lading, which he had signed by his initials only; and he relied on the case of *Howell v. Coleman* (*a*), where the Court refused to set aside proceedings, and order the bail-bond to be delivered up, because the defendant had been arrested on a special *capias*, in

(*a*) 2 Bos. & Pul. 466.

which, as well as in the affidavit to hold to bail, the initials only of his Christian name were inserted.

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**Lord Chief Justice Best.**—In *Taylor v. Rutherford* (*a*), the defendant was arrested by the initials of his Christian name only, and signed a bail-bond in a similar manner; and the Court discharged him on entering a common appearance, on his undertaking to bring no action. In future, the filacter should take care that a party is not described by the mere initials of his Christian name. If the drawer or acceptor of a bill of exchange, or party to a written instrument of a like nature, sign by his initials only, and refuse to give his full name, on being required to execute a bail-bond, he ought not to be relieved on an application of this description. This rule, however, must be made—

**Absolute (b).**

(*a*) 6 B. Moore, 264. (*b*) See *Reynolds v. Hankin*, 4 Barn. & Ald. 536.

#### HARMER *v.* ASHBY and Others.

Saturday,  
May 7th.

THE defendants in this cause having been held to bail, on the following affidavit of debt:—viz. “*John Harmer, of, &c. maketh oath and saith, that Robert Strafford, Howell Ashby, Richard Rowland, and Benjamin Shaw, are jointly indebted to this deponent in the sum of 300l. and upwards, upon, and by virtue of, a bill of exchange, drawn by one James Knox, upon, and accepted, in the name and firm of Ashby & Co., by the said Robert Strafford, Howell Ashby, Richard Rowland, and Benjamin Shaw, or one of them, payable to the order of the said James Knox, and by him indorsed to this deponent, and which bill was due at a day now past.*”—

An affidavit of debt, stating that *R. S., H. A., R. R., and B. S.*, were jointly indebted to the plaintiff, on a bill of exchange, “accepted (in the name and firm of *A. & Co.*), by the said *R. S., H. A., R. R., and B. S., or one of them.*”— Held insufficient.

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Mr. Serjeant *Wilde* obtained a rule calling on the plaintiff to shew cause why the bail-bond, which had been given by the defendants, should not be delivered up to be cancelled, and a common appearance entered, on the ground of the insufficiency and uncertainty of the above affidavit.

Mr. Serjeant *Pell* now shewed cause, and submitted that the affidavit was sufficiently certain; and that the fact was as therein stated; i. e. that the bill had been accepted by one of the defendants, for himself and partners, in the name and firm of *Ashby & Co.*: and that if the affidavit had merely stated the bill to have been accepted by the defendants generally, it would have sufficed; and consequently, that the words "or one of them," although in themselves uncertain, might, as they were unnecessary, be rejected as superfluous: but—

The Court held, that although an acceptance by one of several partners, amount, in law, to an acceptance by all; and the affidavit might, had the words "or one of them" been omitted, have been sufficient: yet, that, as they were inserted, the affidavit was thereby rendered vague and indefinite; and that they could not be regarded as mere superfluous.

Rule absolute.

Saturday,  
May 7th.

#### BAKER v. GARRATT and VENABLES.

THIS was an action on the case against the late sheriff of *Middlesex* for taking insufficient sureties in an action of replevin, the assignee of the replevin-bond cannot recover, as special damage, the costs incurred by him in suing the sureties without effect, unless notice of his intention to sue them had been previously given to the sheriff.

of replevin. The declaration stated, that the plaintiff, on the 2<sup>d</sup> August, 1822, at the parish of St. James, Clerkenwell, in the county of Middlesex, as bailiff to one *John Blacket*, and by his command, in a certain dwelling-house there, took and distrained certain goods and chattels of one *Henry Bowman*, of great value, to wit, of the value of 50*l.*, as a distress for certain arrears of rent, to wit, for the sum of 25*l.* 17*s.* 4*d.*, then due and owing from one *Elhanan Winchester Vidler* to the said *John Blacket*, for the rent of the said premises, with the appurtenances, by virtue of a certain demise thereof, theretofore made to the said *E. W. Vidler*, rendering rent for the same;—that the plaintiff then and there detained the goods and chattels, so taken and distrained for the cause aforesaid, according to the law and custom of this realm, until the defendants, then being sheriff of the said county of Middlesex, afterwards, to wit, on the 28th August, 1822, and within their bailiwick, as such sheriff, to wit, at, &c., on the complaint of the said *Henry Bowman*, made to the said defendants, so then being such sheriff as aforesaid, against the said plaintiff, in that behalf, and under colour of their office of such sheriff as aforesaid, caused the said goods and chattels to be replevied and delivered to the said *Henry Bowman*; and then and there made deliverance of the said distress to the said *Henry Bowman*, to wit, at, &c., aforesaid; that afterwards, to wit, at the then next county court for the said county of Middlesex, to wit, at the county court of the said sheriff, holden on the 19th September, 1822, before, &c., then suitors of the said court, the said *Henry Bowman* did appear, and then and there, in the said court, without the writ of our said lord the King, levied his plaint against the said plaintiff, for the taking and unjustly detaining of the goods and chattels of the said *Henry Bowman*, and then and there found pledges, as well for prosecuting his said plaint, as for returning the said goods and chattels,

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if return thereof should be adjudged by law, to wit, one *Josiah Harding* and one *William Adams*; which said plaint, afterwards, to wit, on the 20th September, in the year aforesaid, was duly removed, at the instance of the plaintiff, from and out of the county court of the said sheriff, into the Court of our said lord the King of the Bench here, to wit, at *Westminster* aforesaid, by virtue of his Majesty's writ of *recordari facias loquelas*, before then duly sued and prosecuted out of the Court of our said lord the King of his *Chancery* at *Westminster* aforesaid, returnable before his Majesty's then Justices of the Bench at *Westminster*, on the morrow of All Souls then next ensuing; that thereupon the plaintiff was summoned before his Majesty's said Justices at *Westminster*, to answer the said *Henry Bowman*, of a plea, wherefore he took the said goods and chattels of the said *Henry Bowman*, and unjustly detained the same, &c.;—that the plaintiff, in his proper person, offered himself, on the fourth day, against the said *Henry Bowman*, in the plea aforesaid; but that the said *Henry Bowman*, although solemnly called, came not, but made default; nor did he further prosecute his writ against the plaintiff:—that such proceedings were thereupon had in the said plea, in the Court of our said lord the King of the Bench here, at *Westminster* aforesaid, that afterwards, to wit, in *Michaelmas Term*, 3 Geo. 4, it was considered and adjudged, in and by the same Court, that the said *Henry Bowman* should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, &c., and that the plaintiff should go thereof without day, and have restitution of the said goods and chattels, &c.; of all which said several premises the said *Henry Bowman* afterwards, to wit, on the 15th November, in the year aforesaid, at, &c. aforesaid, had notice:—that although it was the duty of the defendants, before their making deliverance of the said distress to the said *Henry Bowman* as aforesaid, in pursuance of the statute in such

case made and provided, to take from the said *Henry Bowman*, and two responsible persons, as sureties, a bond in double the value of the goods and chattels so distrained as aforesaid, conditioned for the prosecuting the suit of replevin of the said *Henry Bowman*, for the taking of the said goods and chattels, with effect and without delay, and for duly returning the goods and chattels so distrained, in case a return be awarded:—that nevertheless the defendants, so being such sheriff as aforesaid, not regarding their duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure the said *John Blacket*, and to deprive him of the benefit of his said distress, and of the means of obtaining satisfaction for the said arrears of rent so due and owing as aforesaid, did not nor would, before their making deliverance of the said distress to the said *Henry Bowman* as aforesaid, take from the said *Henry Bowman* and two responsible persons, as sureties, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously omitted and neglected so to do; and on the contrary thereof they (the defendants) wrongfully and unjustly, before the replevying and delivery of the said goods and chattels as aforesaid, to wit, on the 28th *August* in the year aforesaid, did take, in the name of them (the defendants), as such sheriff as aforesaid, of the said *Henry Bowman*, and two other persons, to wit, one *Josiah Harding*, and one *William Adams*, a certain bond, conditioned for the prosecuting the said suit of the said *Henry Bowman* with effect, and without delay, and for duly returning the said goods and chattels so distrained as aforesaid, in case a return thereof should be awarded, as a bond taken in pursuance of the said statute;—that, nevertheless, the plaintiff in fact said, that the said *Josiah Harding* and *William Adams*, so taken as sureties as aforesaid, at the time of their becoming pledges and sureties in that behalf, as aforesaid, were not good, able, sufficient, or responsible sureties for prosecuting the said suit with effect,

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and without delay, or for duly returning the said goods and chattels so distrained as aforesaid, in case a return thereof should be adjudged; but that the said *Josiah Harding* and *William Adams*, at the time of their becoming such sureties as aforesaid, were, and ever since had been, and still were wholly insufficient for that purpose; nor had the said goods and chattels, or any or either of them, or any part thereof, been returned to the plaintiff, or to the said *John Blacket*; nor had the said arrears of rent, or any part thereof, been paid or satisfied to the plaintiff; nor had the said judgment been in any way satisfied; nor had the said *Henry Bowman* answered to the plaintiff for the value of the goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof; by means of which said several premises, he, the plaintiff, had been, and was wholly deprived of the said goods and chattels, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and the costs and charges by him in that behalf expended, in and about his suit, and in and about the endeavouring to obtain a return of the said goods and chattels, to wit, at, &c., aforesaid, and had also been forced and obliged to pay, lay out, and expend a large sum of money, to wit, the sum of 200*l.* in and about endeavouring to compel the said *Josiah Harding* and *William Adams* to pay him the value of the said goods so distrained as aforesaid. The defendants pleaded not guilty.

At the trial, before Lord Chief Justice *Bent*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiff, having signed judgment of *non pros* against *Bowman*, and taxed the costs, the latter became bankrupt, when the plaintiff took an assignment of the replevin bond, and afterwards issued writs against *Bowman* as the principal, and *Harding* and *Adams*, as the sureties on the bond; but that, having failed in his attempt to serve *Bowman* and *Harding*, he was obliged to proceed against

*Adams* alone; against whom he obtained a verdict, and entered up judgment, for the damages and costs, which amounted to 80*l.* 9*s.* 7*d.*, for which sum a *f. fa.* was issued, to which the sheriff returned *nulla bona*. That the plaintiff afterwards proceeded against the other surety, *Harding*, and obtained a verdict, and entered up judgment, against him, for 89*l.* 5*s.* 7*d.*, damages and costs, on which a *f. fa.* was issued, and to which there was also a return of *nulla bona*. It also appeared that both the sureties were, at the time the bond was taken, insufficient, and not responsible persons; that there had been several writs issued against them, and that they had both, in 1820, taken the benefit of the insolvent debtor's act; and on their schedules being produced, it appeared that they had little or no property to satisfy their creditors. It was also proved, that *Adams* had received a guinea from the sheriff's officer to become one of the sureties in the bond.

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For the plaintiff, it was insisted, that he was entitled to recover the costs incurred by him in prosecuting the suits against the sureties, independently of the penalty in the replevin bond, (being double the value of the goods distrained): and it was submitted, that although in the case of *Evans v. Brander* (a) it was decided, that, in an action of this description, the sheriff was only liable in damages to the extent of double the value of the goods distrained; yet that that case differed most materially from the present, as, there, the plaintiff merely averred that he had lost the benefit of the distress, and he only sought to recover the costs of the replevin suit and the rent in arrear; whereas, here, he has expressly alleged the special damage that accrued to him from his unsuccessful endeavours to compel the sureties to pay him the double value of the goods distrained.

His Lordship, however, being of opinion that the case

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referred to was decided on the broad principle, that the sheriff should be liable no farther than the sureties themselves would have been, if sufficient, a verdict was taken for the plaintiff, for 52*l.* 4*s.*, being double the value of the goods distrained; and his Lordship reserved leave to the plaintiff to move to increase the damages from that sum to 119*l.* 9*s.* 7*d.*, the difference being the amount of the costs incurred by him in ineffectually suing the sureties.

Mr. Serjeant *Wilde* having, on a former day in this Term, obtained a rule *nisi* to the above effect,—

Mr. Serjeant *Vaughan* now shewed cause, contending, that as the defendants, as sheriff, could not be liable beyond double the value of the goods distrained, (the penalty in the replevin bond), there was no reason for increasing the damages found for the plaintiff at the trial. Sureties under the statute 11 *Geo. 2*, c. 19, are substituted in lieu of pledges under the statute of *Westminster 2d* (13 *Edw. 1*, c. 2), and the former statute limits their responsibility to double the value of the goods distrained; and the plaintiff cannot be put in a better situation than he would have been if the defendants had taken sufficient pledges. In *Yea v. Lethbridge*, the doctrine laid down by Lord *Kengon*, and to which Mr. Justice *Ashhurst* and Mr. Justice *Buller* assented (*a*), is, that, in an action of this description, the value of the goods distrained or taken is the true measure of the damages to be given, and that the plaintiff cannot recover more. And although it was, after great doubt, ruled, in *Concanen v. Lethbridge* (*b*), that, in such case, the plaintiff might recover damages to the extent of the injury he had actually sustained, even if it exceeded the amount of the penalty in the bond, *i. e.* double the value of the goods distrained; yet

(*a*) 4 *Term Rep.* 435.

(*b*) 2 *H. Bl.* 36.

in the subsequent case of *Evans v. Brander*, the Court, being referred to the cases of *Yea v. Lethbridge*, and *Concanen v. Lethbridge*, said, that " notwithstanding the late determinations on the subject, the good sense and justice of the case seemed to be, that the sheriff should be liable no further than the sureties would have been, if the former had done his duty, and taken a bond under the statute 11 Geo. 2, c. 19, and they had been sufficient; that their responsibility was limited, by that statute, to double the value of the goods distrained; which sum ought to be the measure of damages against the sheriff."

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Mr. Serjeant *Wilde*, in support of his rule.—It is unnecessary to impugn the principle laid down in *Evans v. Brander*, as this case is altogether distinguishable from it; for here the plaintiff has not only been put to expence in suing the sureties, in order to obtain from them the amount of the penalty in the bond, but he has averred in his declaration, by way of special damage, that he was obliged to lay out a large sum in endeavouring to compel them to pay him the double value of the goods distrained. If those sureties had been sufficient, he would undoubtedly have been entitled to recover from them the costs of the actions brought against them; and he must, therefore, be equally entitled to recover them from the sheriff, the sureties being insolvent, and unable to pay either debt or costs. Although the case of *Evans v. Brander* seems to confirm that of *Yea v. Lethbridge*, and to doubt the authority of *Concanen v. Lethbridge*; yet that case was, in fact, disposed of without argument; the Court recommending to the counsel on both sides to agree to reduce the damages found by the Jury, (which were the full amount of the rent, and of the costs of the replevin, and of the writ of *retorno habendo*), to the amount of double the value of the goods distrained; to which they assented. The authority, therefore, of that case, may well be questioned. In *Concanen v. Leth-*

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bridge, the reporter noted, that it was not stated under the *per quod*, in the declaration, that the plaintiff had sustained damage by the costs of the replevin suit; nor does it, in fact, appear, from the report of that case, that the sureties were sued at all. Here, however, the plaintiff has unavoidably incurred considerable expence in having so done, and has properly alleged it in his declaration. The sheriff is bound to put the plaintiff in the situation he would have been in, provided the sureties had been sufficient and responsible; and as they were clearly not so at the time the bond was taken, and the plaintiff has thereby sustained special damage, he is entitled to call on the defendants to remunerate him to the full extent of that damage. The plaintiff, when he proceeded against the sureties, had no knowledge of their insufficiency. The costs of proceeding against them were incurred necessarily; and, as it was the duty of the sheriff, at the time the bond was executed, to have ascertained that they were responsible, he must be held liable to the extent to which the sureties themselves would have been if responsible.

[Lord Chief Justice Best.—The plaintiff ought to have given notice to the defendants, that he intended to proceed against the sureties; and, as he did not do so, I am of opinion that he is not entitled to recover, as special damage, the expenses incurred by him in suing them. If he had given such notice, the sheriff might have paid him the amount of the penalty in the bond, without obliging him to proceed in the actions against the sureties; and it is not alleged in the declaration that the sheriff had any such notice. The plaintiff, too, ought, in justice, to have sued the parties to the bond jointly, instead of bringing separate actions against them.]

The very act of demanding an assignment of the replevin bond, was equivalent to a notice that the plaintiff intended to sue on it; and the sheriff, knowing the insolvency of the sureties, ought then to have paid the amount of the pe-

nalty, to which they would have been liable if sufficient, instead of treating it as if they were responsible persons. The plaintiff was fully justified in taking the steps he did, without giving formal notice to the defendants; and under the circumstances, he was forced to proceed against the parties separately, being unable to serve two of them in the first instance: and, therefore, the costs incurred were such as could not be avoided; and he is, consequently, entitled to recover their amount in this action.

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Lord Chief Justice Best.—The only point on which I have entertained any doubt, was not raised at *Nisi Prius*; nor was it even adverted to when the rule to increase the damages was obtained. The only question then was, whether this case were distinguishable from that of *Evans v. Brander*. Here the plaintiff has averred in his declaration, that he has been obliged to expend a large sum of money in endeavouring to compel the sureties on the bond to pay him the value of the goods distrained. But the decision of the Court in *Evans v. Brander*, did not rest on the form of the declaration. It established a general principle; viz. that the sheriff, in an action against him for taking insufficient pledges in replevin, is liable in damages to the extent of double the value of the goods distrained, but no further; and that no more can be recovered against the sheriff, for taking insufficient sureties, than could have been recovered from the sureties themselves, had they turned out to be responsible and sufficient. With that decision I fully concur. In that case, however, the question arose as to the costs in the action of replevin; whilst, here, the subject matter is, the costs incurred by the plaintiff in suing the insufficient sureties, on the bond. The reasoning of Lord Loughborough, in *Concanen v. Lethbridge*, does not appear to be satisfactory, as he seems to have conceived that the plaintiff might recover damages to the extent of the loss which he had actually sustained, although it

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exceeded double the value of the goods distrained. That, however, is inconsistent with *Yea v. Lethbridge*, which established the same principle as was laid down in *Evans v. Brander*. Cases, it is true, may occur, where the plaintiff would be entitled to recover all the costs he might have been put to in consequence of the insufficiency of sureties; but he cannot here. It is not necessary for me to consider the form of the declaration, and I abstain from giving any opinion on it, as the ground on which I rest is, that the plaintiff cannot recover against the sheriff, he not having, previously to commencing actions against the sureties, given him notice that he intended so to do. If he had, the defendants might have prevented the expence of those actions, by paying the amount for which the sureties were liable, i.e. double the value of the goods distrained. It has, however, been said, that the assignment of the bond to the plaintiff was a sufficient notice, and that the defendants must have known the insolvency of the sureties. But that is not so; for they might have been solvent when they executed the bond, or even at the time of the assignment; and might only have become insolvent, just before the assignee thought proper to sue them. The sheriff ought, therefore, in justice, to have had due notice of the plaintiff's intention to sue the sureties, in order to give him an opportunity to prevent all the expences which are now sought to be inflicted upon him. If a person become surety for the debt of another, and the creditor seek to recover against the original debtor, he may, if he fail, recover the debt from the surety; but unless the latter had notice of the intention of the creditor to sue his principal, he is not liable for the costs incurred in bringing such action. Here, then, the sheriff may, in principle, be considered as surety for the obligors in the replevin bond; and if, in a case as between debtor or creditor, a surety be entitled to notice, the sheriff is equally so; or if any distinction can be drawn between the two cases, it is, that the latter is entitled to a larger share of protection and indulgence

than an ordinary individual, standing, as he does, in the situation of a public officer, whereby he is frequently exposed to great difficulty, and subjected to much trouble and inconvenience. I am, therefore, of opinion, that, as the requisite notice was not given to the defendants, and no opportunity was afforded them to pay the sum for which they were liable, previously to the commencement of the actions against the sureties, the plaintiff cannot recover the costs incurred by those fruitless suits, although he has alleged the loss, by way of special damage, in his declaration.

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Mr. Justice PARK.—This case must be governed by that of *Evans v. Brander*, which has established a true principle, confirming the decision of the Court of *King's Bench*, in *Yea v. Lethbridge*. Although Lord *Loughborough*, in *Concanen v. Lethbridge*, decided that the plaintiff, in a case of this description, might recover damages to the extent of the injury which he had actually sustained; yet Lord Chief Justice *Eyre*, who succeeded him, assisted by Mr. Justice *Buller*, (who was a Judge of the Court of *King's Bench*, when *Yea v. Lethbridge* was decided), and Mr. Justice *Rope*, held, in *Evans v. Brander*, that the justice of the case was, that the sheriff should be liable no further than the sureties would have been if he had done his duty, and taken a bond under the statute 11 Geo. 2, c. 19, and they had been sufficient; and that their responsibility was limited by that statute to double the value of the goods distrained. The verdict in this case was taken accordingly. It has been said, however, that this case is distinguishable, as the plaintiff seeks to recover the expenses incurred by him in prosecuting actions against the sureties, who were proved to be insufficient, and not the costs attending the replevin suit. But it was, surely, unreasonable for the plaintiff to commence three actions against the parties to the bond: and before the sheriff can be liable for

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the costs attending those suits, he should, at least, have had notice from the plaintiff, that he meant to proceed against the sureties. He might then have made inquiries as to whether or not they were sufficient, in order that, if he should ascertain that they were not responsible, he might have been relieved, on paying the amount of the penalty in the bond. But here, as no such notice was proved to have been given, I think there is no ground whatever to increase the damages given on the trial.

**Mr. Justice BURROUGH.**—This decision will not in any manner interfere with any previous authorities: and I am of opinion, that, as the plaintiff has not averred that the defendants had notice of his intention to sue the sureties, the declaration is insufficient; for, in that case, they might either have defended the actions against them, or, if they thought proper, by paying the amount of the penalty, they might have exonerated themselves.

**Mr. Justice GASELEE.**—It appears to me to be unnecessary to consider, whether or not it were requisite for the plaintiff to aver that the defendants had notice that he meant to sue the sureties on the bond; as the absence of proof of such notice was sufficient for the defendants. This is certainly a new question, and is of great importance to those who fill the office of sheriff. The plaintiff was not bound to take an assignment of the replevin bond, but had an independent remedy against the sheriff for taking insufficient pledges. At all events, before he commenced the actions against the sureties, he should have inquired whether they were then responsible or not, or whether or not they were of ability to pay costs; and as it does not appear that he did so, he proceeded at his own peril. Besides, he should have given the defendants notice of his intention to sue the sureties, before he proceeded in the actions against them; and if he had done so, they would, in all probability,

have paid him the double value of the goods distrained, by which the bond would have been satisfied. It is not even alleged, in the declaration, that the sheriff had taken the sureties, knowing them to be insufficient at the time the bond was executed; if it had been so alleged, the necessity for the notice might perhaps have been dispensed with.

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Rule discharged.

HELLINGS, Gent., One, &c., v. GREGORY the Elder, and  
GREGORY the Younger.

Saturday,  
May 7th.

THIS was an action of *assumpsit*, brought by the plaintiff, an attorney, against the defendants, to recover the sum of 35*l.* 1*s.* 7*d.*, being the amount of his bill of costs. It appeared, at the trial before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, that the defendants went together to the office of the plaintiff, and requested him to undertake a journey to *Bridgewater*, to inspect some title-deeds of an estate; and that he refused to go on the father's account, he having lately taken the benefit of the insolvent debtor's act, but that he afterwards consented to go, on the son's saying he would pay him: and that both the defendants were afterwards arrested, the one as the drawer, and the other as the acceptor, of a bill of exchange, at the suit of one *Toggill*, and that they sent for the plaintiff to procure bail for them; which he did, the son paying the fees for the two bail-bonds, and saying, that he would pay the plaintiff whatever charges were incurred in the business, for himself and his father. That a copy of the bill was delivered to each of the defendants, and they afterwards called together at the plaintiff's office, and, acknowledging the receipt of the bill, requested the plaintiff to give them time to pay it, the son saying, in the presence of the father, that it was impossible to pay it at once; but that, if the plaintiff would allow it, he and his father

In an action, brought by an attorney against two defendants, to recover the amount of his bill of costs, it appeared, that he was employed by both, in the first instance, but that one only undertook to pay; and the Jury, having found that the latter alone was liable, and given a verdict for the defendants:— the Court refused to set it aside, or grant a new trial.

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would pay it by instalments. On the production of the bill, the charges appeared to consist of three items; the first, for the plaintiff's going to *Bridgewater*, for which the son alone was made debtor; the second, for defending both the defendants in the actions on the bill of exchange; and the last, for business done for the elder defendant, on his taking the benefit of the insolvent act.

For the defendants, it was contended, that, on this evidence, the action could not be maintained against them jointly, as only one of them had made any payment to the plaintiff, or any promise to do so; and that there was no proof of the business having been done for the defendants, on their joint account. His Lordship left it to the Jury to say, whether the plaintiff had acted on the joint retainer of both the defendants, or merely on the undertaking of one of them. They said, that they considered that the whole of the business was done on the separate undertaking of the son; and accordingly found a verdict for the defendants.

Mr. Serjeant *Pell*, on a former day in this Term, obtained a rule, calling on the defendants to shew cause why this verdict should not be set aside, and a verdict entered for the plaintiff, or a new trial granted; on the ground that the verdict was against the weight of evidence, as the plaintiff undertook to go to *Bridgewater* for the benefit of both the defendants; and that, at all events, there was sufficient evidence for the Jury to say, that there was a joint employment; and that, although the bill was delivered to each separately, both of the defendants acknowledged its receipt, and promised to pay.

Mr. Serjeant *Wilde* now shewed cause, and contended, that, as one of the defendants, *viz.* the son, had merely entered into an undertaking to pay the debt of his father (the other defendant); and as the son alone had paid the expenses

incident to the arrest, there was no evidence of a joint promise to the plaintiff; that, even if there had been, it would not have been sufficient, without a joint retainer or employment by both; and it would then have been a question for the Jury to determine, whether such employment had been for their joint benefit: and that, the Jury having expressly found that there was a separate employment, and that one defendant only had made himself liable, by his promise, there was no reason to disturb their verdict.

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**Mr. Serjeant Pell**, in support of his rule.—If the business were done on the credit of both the defendants, and it should eventually turn out to be for the benefit of one only, the action might still be maintained against both. The plaintiff, knowing that one of the defendants (the father,) had been insolvent, would not have made him a co-defendant with the son, unless there had been a joint undertaking. Both the defendants applied to the plaintiff, when they were arrested on the bill of exchange, to obtain bail for them. They were, therefore, jointly interested in the business done for them on that occasion. They also both joined in the request to the plaintiff to go to *Bridgewater*, to examine the title-deeds of the estate. There was, therefore, sufficient to shew that they were jointly liable to the plaintiff for the amount of his bill; and if so, a verdict ought to be entered for him, and that for the defendants set aside. At all events the plaintiff is entitled to a new trial.

**Lord Chief Justice Best.**—It is unnecessary to say any thing as to the law of this case; and I now entertain the same opinion I expressed at the trial. The only question is, whether or not the defendants were jointly liable; or, whether there had been a joint, or merely a separate undertaking by one of them, to pay the plaintiff the amount of his bill. It is necessary to observe, that the

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bill was headed as making the son alone the debtor; and I called the attention of the Jury to the different items contained in the bill, and to all the recognitions or promises made by the defendants, either jointly or separately, as well as to whether or not the costs were incurred for the benefit of both. They stated, that they considered the whole of the business to have been done on the undertaking of the son alone; and there certainly was strong evidence to shew that fact, as he alone had paid all the expenses previously incurred. I therefore think it would be too much to say, that, under the circumstances, the Jury have drawn a wrong conclusion.

Mr. Justice PARK.—It must be considered that the plaintiff was an attorney; and if he have brought this action improperly, he can have no reason to complain. There was strong evidence that the son alone gave a separate undertaking to pay the amount of the bill; and it also appeared that the plaintiff refused to undertake the journey to *Bridgewater* on the father's account, as he had recently taken the benefit of the insolvent act; and that he only consented to go, on the son's saying he would pay him. At all events, whether the undertaking to pay were joint or separate, was a question expressly within the province of the Jury to decide; and their verdict appears to me to be conclusive.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule discharged.

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## THOMAS COFFEY v. BRIAN.

THIS was an action of *assumpsit*. The first count of the declaration stated, that, on the 12th November, 1824, in consideration that the plaintiff, at the request of the defendant, had, before then, accepted certain bills of exchange, drawn on the plaintiff by one *John Coffey*, the plaintiff's brother, *viz.* one for 228*l.*, and another for 300*l.*, on account of butters sold in *London*, *on the joint account of the defendant and the plaintiff's brother*, the proceeds of which butters were in the hands of the defendant; he, the defendant, undertook and promised the plaintiff, to provide for the bills when at maturity;—assigning for breach, the not providing for such bills as they respectively became due, whereby the plaintiff was obliged to, and did, pay the same, to certain holders thereof. There were three other counts, which were, in substance, similar to the first, with the usual money counts. The defendant pleaded the general issue.

The cause was tried before Lord Chief Justice *Best* at *Guildhall*, at the Sittings after the last Term, when it appeared that the plaintiff, *John Coffey* his brother, and the defendant, had been jointly concerned in the *Irish* butter trade; that *John Coffey*, who resided in *Ireland*, made consignments of the butters to the defendant, in *London*, for sale; and that the profits were to be divided between the three. The bills in question were given in payment, on the purchase of some of the butters in *Ireland*, by *John Coffey*, and were drawn by him on the plaintiff. The latter, however, expressed himself unwilling to accept those bills, without having some security for the risk he would thereby incur; when the defendant, who

objected that it was a partnership transaction, and that one partner could not maintain an action against another;—the money in the defendant's hands becoming, when the bills were paid by the plaintiff, separated from the partnership account.

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The plaintiff, the defendant, and one *J. C.*, being jointly concerned in trade, *J. C.* consigning goods to the defendant to sell on the joint account, the profits being to be divided equally between them; bills of exchange were given in payment for them by *J. C.* which were drawn by him on the plaintiff. The latter having expressed a reluctance to accept the bills without security, the defendant undertook to provide for them when at maturity, out of the proceeds of sales already in his hands:—Held, that the plaintiff, having accepted and paid the bills, might recover against the defendant on a count for money had and received; although he had declared specially on the undertaking, and there was a variance between the contract alleged and that proved; and although it was

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had in hand the proceeds of the sales of certain of the butters, engaged, by letter, to provide for the bills, on their arrival at maturity, out of such proceeds; which letter, signed by the defendant, and addressed to the plaintiff in *Ireland*, was in the following terms:—

*London, 12th November, 1824.*

“ Sir,—Your brother, *John Coffey, Junr.*, having drawn two bills on you, *viz.* one for *228l.*, due the 28th instant, and another for *300l.*, due on the 4th of *January* next, on account of butters sold here for *our joint account*, the proceeds of which are now in my hands, if you will accept the bills, I hereby formally engage to provide for them when at maturity.”

The plaintiff, in consequence, accepted, and was subsequently obliged to pay, the bills; and accordingly brought this action against the defendant on his undertaking.

The bills having, in the special counts, been stated to have been accepted, by the plaintiff, for the joint account of *the defendant and the plaintiff's brother*; and it being proved that the trading was on the *joint account of the plaintiff, his brother, and the defendant*, and that the profits arising from the sale of the butters were to be divided equally between the three, it was insisted that this was a fatal variance, and precluded the plaintiff from recovering in this action. His Lordship, however, was inclined to think the objection immaterial, as the defendant engaged to provide for the bills out of the proceeds of the butters, which were sold on the joint account of himself, the plaintiff, and the plaintiff's brother; and held, that, as the plaintiff had paid his acceptances, he was entitled to recover on the count for money had and received; for that, as the defendant had undertaken to provide for such acceptances when arrived at maturity, out of the proceeds then in his hands, it must be considered as money of the plain-

tiff in the possession of the defendant, or as money had and received by the latter to the use of the former.

The Jury accordingly found a verdict for the plaintiff. But his Lordship reserved to the defendant liberty to move that it might be set aside, and a nonsuit entered, if the Court should be of opinion that the plaintiff was not entitled to recover.

A rule *nisi* to that effect having, on a former day in this Term, been granted, on the motion of Mr. Serjeant *Pell*,—

Mr. Serjeant *Vaughan* now shewed cause.—There cannot exist a doubt, either on the form of the declaration, the terms of the defendant's undertaking, or the evidence adduced at the trial, of the plaintiff's right to recover as for money had and received. This action was brought by him as the acceptor of two bills of exchange, for which the defendant had, by letter, expressly undertaken to provide; and on that undertaking alone the plaintiff rests his claim. The defendant acknowledged, at the time of his entering into the engagement, that he had sufficient funds in his hands, arising from the sales of the butters, which the plaintiff's brother, *John Coffey*, had previously consigned to him. The acknowledgment, that he had proceeds, out of which he engaged to provide for the bills, makes it money had and received by him to the use of the plaintiff; and the latter would not have accepted the bills, but for the express undertaking of the defendant to meet them. That undertaking must be construed according to the intent of the parties, which was, that the plaintiff's acceptances were to be paid, by the defendant, out of the produce of the butters already sold, and then in his actual possession. Although the profits arising from the joint speculations were to be ultimately divided between the three parties, *viz.* the plaintiff, his brother, and the defendant; and although the butters were

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consigned to the latter, on the joint account; yet the plaintiff accepted the bills in question on the separate and express undertaking of the defendant to honor them when due. That, therefore, was a matter wholly distinct from any profits which might eventually accrue to the parties from the sales effected by the defendant; and it is clear, that, under all the circumstances, the plaintiff was entitled to consider the proceeds, acknowledged by the defendant to be in his hands, and which the latter expressly undertook to appropriate to take up the bills when they should arrive at maturity, as money had and received to his use.

Mr. Serjeant *Pell*, in support of the rule.—The count for money had and received was not relied on for the plaintiff, nor was it even adverted to at the trial; but he having totally failed to establish the defendant's undertaking as set out in the special counts, an attempt was made to rely on the account stated. It is evident, that, without the special counts, this action cannot be maintained. No evidence was produced, on the part of the plaintiff, to shew that he had accepted the bills for the consideration set out in those counts; nor was there any proof that they were drawn on account of the defendant and *John Coffey* alone. The butters in question were consigned to the defendant on the joint account of the three; they were to be sold on such account; and, of the profits to arise from such sales, each party was to receive one third. It must, therefore, be considered as a partnership transaction, and that being the case, the plaintiff, as one of the partners, cannot maintain an action against the defendant, another partner, no balance having been struck, and no agreement entered into, by which the one partner had engaged to be separately liable to the others.

Lord Chief Justice *BEST*.—I abstain from giving any opinion as to the question of variance, which was raised

for the defendant at the trial, it being quite clear, that the plaintiff is entitled to recover on the count for money had and received. It has been said, that the present action cannot be maintained, as this was a partnership transaction; and that the proceeds of the butters consigned, were received by the defendant on account of all three of the parties. I agree that the amount received by the defendant, on account of the consignments, must be considered as money in his hands, for the benefit of, and to be divided among, the three; but that which transpired between the plaintiff and defendant took it out of the joint or partnership account, and placed it to that of the plaintiff. What are the facts? The plaintiff's brother, having drawn two bills on him, for the value of the butters consigned, the defendant, previously to the plaintiff's accepting them, guaranteed to provide for them, when they arrived at maturity, out of the proceeds which he acknowledged were then in his hands, and which he must therefore be considered to hold on the plaintiff's account. It was no longer partnership money, but became bound, in the defendant's hands, for and on account of the plaintiff; and when the plaintiff paid his acceptances, (which he proved he did), the money the defendant held as the proceeds of the butters, became separated from the partnership account, and was money had and received by him to the plaintiff's use. When a contract has been executed, a party is entitled to recover on the common counts. Here the defendant was responsible to the plaintiff, to a given amount; and although the contract was executory in the first instance, i. e. until the bills became due; yet, when the plaintiff took them up, it must be considered as executed. I am, therefore, of opinion that the plaintiff was entitled to recover on the count for money had and received.

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Mr. Justice PARK.—It is unnecessary to come to any de-

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termination on the question of variance, or to enter into a critical discussion respecting it; for I concur with my Lord Chief Justice in thinking that this action may be maintained on the count for money had and received; or, if not, on the account stated. In *Foster v. Allanson* (a), where two persons entered into articles of partnership for seven years, in which there was a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership; and they dissolved the partnership before the seven years were expired, and accounted together, and struck a balance, (which was in favour of the plaintiff), including several items not connected with the partnership, and the defendant promised to pay it;—it was held that an action of *assumpsit* lay on such express promise; as, by the stating of the account and introducing other articles not relating to the partnership, the nature of the demand was changed, and a new cause of action arose, independently of the articles of partnership. So here, although the butters were, in the first instance, consigned to the defendant, on the joint account of all three, *viz.* himself, the plaintiff, and his brother; yet it was necessary for the plaintiff to draw, and find an acceptor to, the bills in question, which were drawn for the amount of the butters sent; on which the plaintiff said, although I am a partner in the transaction, yet I will not accept the bills, unless I have a security; the defendant then undertook to appropriate the proceeds of the butter in his hands, to the payment of the bills, when they should arrive at maturity; and the plaintiff, having paid their amount out of his own pocket, is entitled to recover it from the defendant; as the undertaking given by him was not only fair, but distinct, and unconnected with the partnership.

Mr. Justice BURROUGH. — My Lord Chief Justice, and my Brother Park, have put the true construction on the

(a) 2 Term Rep. 479.

transaction which took place between the plaintiff and defendant, as to providing for the bills in question. The latter undertook to appropriate a sum, then in his hands, to meet them, when they should become due: and, although the plaintiff might not have been entitled to recover on the special counts, the action is maintainable on that for money had and received. This rule therefore must be—

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Discharged (a).

(a) Mr. Justice *Gazelee* was absent, being at Chambers.

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ELLIOTT v. HARDY.

THIS was an action of replevin. The plaintiff, in his declaration, alleged that the defendant took, and unjustly detained, two cows of the plaintiff, in a certain common, called *Alnwick Moor*, otherwise *Aydon Forest*.

The defendant pleaded several avowries; in one of which he justified the taking, "because the town or borough of *Alnwick*, in the county of *Northumberland*, is, and, from time whereof the memory of man is not to the contrary, hath been, an ancient town or borough, in which there is, and, for all the time aforesaid, hath been, a body politic and corporate, known by divers names of incorporation, and, amongst others, by the name of 'The Burghesses of *Alnwick*,' and the said town or borough is, and from time whereof, &c. hath been, situated within a certain manor or barony called 'The Manor or Barony of *Alnwick*,' and the said place in which, &c. is, and, at the said time when, &c. was, and from time whereof, &c. hath been, a large tract of land, common, or waste ground; and the same lies within, and from time whereof, &c. hath been

*Tuesday,  
May 10th.*

In an action of replevin for taking the plaintiff's cattle, the defendant avowed under a grant of common of pasture, from the lord of the manor, to the burgesses of the borough of *A.*; and the plaintiff pleaded in bar, that the corporation of *A.* had been accustomed to appoint a reasonable and proper number of herds, for (amongst other things) taking care of the cattle put upon the common; and also to appoint, for the pains of each such herd, a reasonable and proper number of stints, of each of such herds, to be depastured

thereon:—Held sufficient, after verdict;—although it was urged that the number of herds and stints, and the duties required from the herds, should have been set out, with certainty, in the plea.

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and is parcel of, the said manor or barony: and *William de Vesci*, being lord of the said manor or barony, and being seised of the said place in which, &c. in his demesne, as of fee, long before the said time when, &c. to wit, in the reign of *Henry the Second*, gave and granted, in and by his certain instrument in writing (the date whereof is unknown to the defendant), to the burgesses of the said town or borough of *Alnwick*, common of pasture in the said place, in which, &c.; and by subsequent grants of certain succeeding lords of the said manor or barony, the said grant of the said *William de Vesci* was confirmed to the said burgesses, for ever; to wit, by a certain grant in writing, made long before the said time when, &c. (the date whereof is unknown to the defendant), of *William de Vesci*, son and heir of Lord *Eustace de Vesci*, and grandson of the first-named *William de Vesci*: and by a certain other grant, in writing, of *William de Vesci*, brother and heir of *John de Vesci*, and son of the last-named *William de Vesci*, bearing date long before the said time when, &c. to wit, on the *Sunday* after the feast of *St. Michael*, in the year of our Lord, 1290: and the said body corporate, ever since the making of the said first-mentioned grant, and at, and long before, the said time when, &c. have had, and have used and been accustomed to have, and of right ought to have had, and still of right ought to have, by virtue of such grants, for each of the several burgesses of the said town or borough of *Alnwick*, inhabiting therein, common of pasture in and upon the said place in which, &c."—The defendant then averred, "that long before the said time when, &c. to wit, on the 24th *April*, 1823, he became, and continually from thence, and until, and at, and after, the said time when, &c. was, and had been, and then was, one of the burgesses of the said town or borough of *Alnwick*; and at the said time when, &c. inhabited, and then did inhabit therein; and was, at and during all the time aforesaid, and then was, entitled to common of

resaid, in the said place in which, &c. : and two cows, in the said declaration mentioned at the said time when, &c. depasturing and there then growing and being, the defendant, so that he the defendant did enjoy the aforesaid common and ample a manner as he did and enjoyed the same, the said two cows in the said justly, &c. as and for a distress by them there done and doing, as

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Avowry the plaintiff pleaded in bar, among other things following:—" That from time whereof the body politic and corporate, in the said avowry mentioned, hath consisted of, amongst other persons, divers, to wit, four chamberlains, and twenty-four common-councilmen, being burgesses of the said town or borough, in the said avowry mentioned. And from time whereof, &c. hitherto, such common-councilmen and chamberlains, or the greater part of them, being in common-council assembled, have appointed, and have been used and accustomed to appoint, and of right ought to have appointed, and still of right ought to appoint, *a reasonable and proper number* of herds, for (*amongst other things,*) the herding, tending, and taking care of the cattle put upon the said place, in which, &c. under, and by virtue, and in exercise, of such right of common as in the said avowry is mentioned: and also, for and during all that time, have appointed, and of right ought to have appointed, and still of right ought to appoint, for the pains and trouble of each such herd, *a reasonable and proper number of stints* of each of such herds as last aforesaid, to be depastured in and upon the said place in which, &c. And that, for and during all the time aforesaid, the said last-mentioned body politic and corpo-

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rate hath had and used, and been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for each of such herds as last aforesaid, common of pasture in and upon the said place in which, &c. for so many stints as were so appointed as aforesaid, of each of such herds as last aforesaid." It was then averred, that the plaintiff was duly appointed herd, and had two stints appointed to be depastured, the same being a *reasonable number*.

The defendant, in his replication to this plea, denied the right of common for the herd's cattle, and, at the trial, before Mr. Justice *Bayley*, at *Newcastle*, at the Summer Assizes, 1824, it appeared that there were sixty-five issues on the record, on twelve of which the jury found a verdict for the plaintiff, and, on forty-two, for the defendant; it having been agreed that a juror should be withdrawn, as to the remaining eleven.

A rule *nisi* having been obtained by Mr. Serjeant *Pell*, in the last *Michaelmas Term*, to enter up judgment for the defendant, *non obstante veredicto*, on the ground that the plaintiff's pleas in bar were not sufficient to sustain such verdict,—

Mr. Serjeant *Wilde* shewed cause, when the Court ordered the entry of the verdict on the *postea* to be confined to the avowry and plea in bar, as above set forth, in order to raise the question as to the sufficiency of such plea, which was now argued by

Mr. Serjeant *Taddy*, for the plaintiff; and by—

Mr. Serjeant *Cross*, for the defendant.

For the plaintiff, it was submitted, that the main objection to the plea was, that nothing appeared on the face of it, by which it could be ascertained what might be *a reasonable number*.

*sonable and proper number* of herds, and what *a reasonable and proper number* of stints of each of such herds; but that, even supposing such an objection might have availed on special demurrer, still it was too late after verdict; for in *Chealde v. Miller* (a), where a plea in bar to an avowry for damage feasant, omitted to state that the cattle were *levant* and *couchant*, the Court held, that, although bad on special demurrer, still it was cured by verdict. In *Viner's Abridgment* (b), it is laid down, that prescription for common *sans* number, appurtenant to land, without saying *levant* and *couchant*, is ill; and *Miller v. Staples* (c) is there referred to, where Mr. Justice Twiss said, “if you prescribe for common without number, appurtenant to the land, you can put in no more cattle than what is proportionate to your land; for the law stints you in that case to a reasonable number. But if you prescribe for common without number, in gross, what is it that sets any bounds in that case? There was a case in *Glynn's time* of *Masselden v. Stoneby*, where *Masselden* prescribed for common without number, without saying *levant et couchant*, and that, being after a verdict, was held good; but, if it had been upon a demurrer, it would have been otherwise.” Here, it must be presumed, that the Jury, at the trial, ascertained, by the evidence adduced, what was a reasonable and proper number of herds and stints. And although the word “reasonable” may be averred in pleading as matter of law, it is ultimately a fact to be found by the Jury. In the common count for goods sold and delivered, the plaintiff avers that the defendant is indebted to him in so much as the goods are *reasonably* worth, and that is a sufficient averment:—the value must be ascertained by evidence. In the case, too, of coparceners, where one claims her share with others, the writ is *de ra-*

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(a) 1 Lev. 196.

(b) Tit. “Prescription,” D 3.

(c) 1 Mod. 7; *S. C. nomine*

*Stables v. Mellon*, 2 Lev. 246.

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*tionabili parte* (a), and what that part may be is mere matter of evidence; as, by such writ, a person may see what rent and services all the land, which is partible betwixt the sisters, shall yield and pay unto the chief lord, and accordingly put every one of the heirs to her part. It has invariably been held, that copyhold fines must be *reasonable*, though the value of the lands is uncertain; and in *Rastall's Entries* (b), there is the form of a writ for *reasonable estovers*, as well as for repairing or building a new house. What is reasonable for either of these purposes may be claimed as such, and ascertained by a Jury; and, therefore, it is too late to raise such an objection as the present after verdict. In *Clarkson v. Woodhouse* (c), it was alleged, that there was a custom, that the owners of a waste or common had set out and assigned to the owners and occupiers of lands, upon their *reasonable* request, certain *reasonable* parts and proportions of the waste or common; and it was objected, that it was too indefinite, *viz.* alleging that the lord should set out a *reasonable* part, without saying what part; to which it was answered, that reasonableness might be tried by a Jury, if the part assigned did not appear to the commoners sufficient; that in the case of estovers, it is always so laid; and Lord Mansfield said, "as to the point of unreasonableness the law controls any arbitrary conduct of the lord." In *Abbot v. Weekly* (d), the defendant prescribed, that all the inhabitants of a vill had, time out of memory, used to dance in the plaintiff's close, at all times of the year, at their free will, for their recreation; and so justified the dance there: and on its being moved, in arrest of judgment, that this prescription to dance in the freehold of another, and spoil his grass, was void, especially as it was laid at all times of the year, and not at reasonable times; and that,

(a) *Fitz. Nat. Brev.* 19.  
(b) P. 539.

(c) 5 *Term Rep.* 412, n.  
(d) 1 *Lev.* 176.

if it were good, it ought to have been laid by way of custom in the town, and not by prescription in the persons; and a case was cited, where it was so adjudged on demurrer: yet the Court said, that though, perhaps, it had been ill on demurrer, yet, that issue having been taken thereon, and found for the defendant, it was good. So, in *Fitch v. Rawling* (a), a custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes, in the close of A., at all *seasonable* times of the year, at their free will and pleasure, was held good; and it must have been left to the Jury to determine what such seasonable times were. If, however, the defendant had, in the present instance, demurred to the plaintiff's plea, the demurrer could not have availed; for it is not uncertain on the face of it, as the reasonable and proper number of cattle to be depastured, might be measured or ascertained by the fact of levancy and couchancy. So, the reward to the herds was to be estimated and proportioned according to the number of cattle fed on the common. The measure, therefore, for the commonable cattle of the corporation, must also be that of those of the herds; and what is reasonable and proper as to the former, must also be so, proportionately, as to the latter. But the avowant cannot avail himself of this objection, as the grant was made to the corporation of the town and borough of *Ainswick*, and not to the herds, and in his avowry he has alleged himself to be one of the burgesses; and the grant was to the corporation for the use of the burgesses, and certain servants to be appointed by them. The burgesses cannot, therefore, contest the rights of their servants, which grow out of and form parcel of their own; as the grant is not a mere power to the corporation to assign over a right of common, but a grant to the corporation and their servants; and what is a reasonable reward for the services of the

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(a) 2 H. Bl. 393.

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herds, is matter of fact, to be ascertained by the extent of the duties required from them; that is, the number of the cattle they have to attend. Where a copyholder prescribes for common in the manor of another, he prescribes in the lord, who claims for himself and his tenants, who are copyholders. This is not a question as between the lord and the corporation and burgesses, but between one of those burgesses and the servants employed by the corporation. If, therefore, the avowant contend that the original grant was bad, it is quite clear that he had no right to distrain; and if good, the plaintiff's right was equivalent to, and coeval with, that of the defendant.

For the defendant, it was insisted, that the plaintiff's plea in bar was clearly bad, as it set out a void prescription; and that such defect could not be cured by verdict. It is merely stated, in the plea, that a reasonable and proper number of herds was to be appointed, for (*amongst other things*) herding and taking care of the cattle put on the common; and it does not appear what those other things were. They might be altogether unconnected with the plaintiff's right of common; nor was the precise number of cattle or herds, or the duties to be required of those herds, set out. Their functions are not confined to the taking care of the land and cattle. That might have formed but a small portion of them. The term *herd* is of an equivocal meaning. It is rather, in fact, applicable to the cattle themselves than to their keepers. The Jury have not found what was a reasonable number of stints; a *reasonable* number is indefinite and uncertain, and it does not follow that they should be confined to two. The verdict merely found the existence of a right to appoint herds; and the right claimed is of a new species, being a right of common in gross for an indefinite number of herds, and stints for an indefinite number of cattle, without any allegation as to whose cattle they are to be, or whether com-

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monable, or of the times of the year at which they are to be turned on: and in *Mellor v. Spaleman* (a) it was held, that a corporation might prescribe for common in gross, for cattle *levant* and *couchant* within the town, but that they could not do so for common in gross *without number*. And Lord Chief Justice *Kelynge* there said (b), "there cannot be any common in gross, without number:" and the Court held, that the plea was bad for want of the words *levant* and *couchant* within the town. So, here, the plea is equally uncertain; and though it do not in terms claim a right so extensive, yet it does so in effect, as the corporation are stated to have been accustomed to appoint a reasonable and proper number of herds, to whom a reasonable and proper number of stints was to be appointed for their trouble; and such cattle are not stated to be confined to commonable cattle, or to those that might be *levant* and *couchant* within the borough, but may apply to any description of cattle whatever. The plea is, therefore, uncertain and bad upon the face of it; and as the Jury have not found the number or description of the commonable cattle, or the number of herds or stints, it must be considered in the same light as if the defendant had raised his objection to it by special demurrer. In *Greene v. Berry* (c), a prescription for copyholders to pay, for a fine, upon a renewal, not more than two years' rent, but to pay two years' rent, *or less*, was held void for uncertainty. And in *Da Costa v. Clarke* (d), a plea in bar to an avowry damage feasant, claiming that the *locus in quo* ought to be open and common on or before a particular day, and from thence for three weeks *and upwards*, and that the cattle were upon the land when it ought to be open and common *as aforesaid*, such plea was held bad for uncertainty, even after verdict, the right of common

(a) 1 Saund. 343.

(c) 2 Rolle's Abr. 264; S. C.

(b) P. 346 e.

Vin. Abr. tit. "Prescription," D.

(d) 2 Bes. & Pul. 257.

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being too generally described, both in its commencement and conclusion. So here the right is not only too generally described, but the claim is indefinite and uncertain.

Lord Chief Justice BEST.—This case has been extremely well argued, both for the plaintiff and defendant. It is unnecessary to decide whether, as the right of common was granted to the corporation, they could assign over or delegate such right to another. That would depend on the question, whether it were common in gross, appendant, or appurtenant. But the first and main question is, whether the right and duties of the herds have been alleged, with a sufficient degree of certainty, in the plaintiff's plea in bar. It is not necessary for us to determine that point as if it had come before us on special demurrer, the objection not having been taken until after verdict. Issue might have been taken on the prescription. Although no question was raised for the Jury to determine what was a reasonable number of herds or stints; yet it was unnecessary, as it was admitted on the face of the pleadings that the corporation had a right to appoint a reasonable and proper number of herds for taking care of the cattle, as well as a reasonable and proper number of stints to be depastured on the common, for the pains and trouble of each such herd: and it appears to me that it has been set out with sufficient certainty. The reasonableness of the number of herds, must depend on the number of cattle the common can bear in any one year. The cases which have been cited for the plaintiff, as well as the instances put, as bearing an analogy to the present question, appear to me to be decisive, to shew that no greater degree of certainty can be required than has been alleged in the plea in bar; as, for instance, in the case of a claim by one of three coparceners, although she be entitled to claim one third, yet she is not bound to demand it; but may demand a *reasonable* part of the property to which she is entitled as joint-

heiress: for which purpose a writ *de rationabili parte* may be sued out. If that mode of proceeding may be adopted in the case of coparceners, it is surely enough for the plaintiff to shew that the corporation had been accustomed to appoint a reasonable number of herds, each of whom was entitled to a reasonable number of stints for their pains or duty, in taking care of the cattle put and depastured on the common. So, if a custom be pleaded for all the inhabitants of a parish, to play at games at all seasonable times of the year, it may, and ought to be left to the Jury to say, what such seasonable times are. It therefore appears to me, that even if this objection had been raised on demurrer, it would not have availed. With respect to the question as to the validity of the custom itself, I am bound to speak with caution, as it is a most important point; but in order to ascertain this, it is necessary to connect the avowry with the plea in bar, and see whether they state a grant, which can be supported in point of law; and if the custom, as it appears on the face of both, is consistent with reason and justice, and has subsisted from time whereof the memory of man is not to the contrary, it is a good custom, and cannot be impugned. The defendant, in his avowry, states, that the corporation of *Alnwick*, under and by virtue of a grant from the lord of the manor, had an immemorial use of common of pasture for the cattle of each of the burgesses inhabiting within the town or borough of *Alnwick*. Such cattle must be confined to those which are *levant* and *couchant* within the borough. The plaintiff, in his plea in bar, admits the existence of the grant, but says in effect, when the grant was proposed, the burgesses of *Alnwick* might have said to the lord, "it will be useless to us, unless we are allowed to appoint herds to superintend or take care of our cattle; and as we cannot pay them for their services, we will give them, in lieu of wages, certain stints, i. e. a right to feed and depasture a certain number of cattle on the same commonable land." There is

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nothing unreasonable in such a supposition; and such a grant appears not only to be intelligible, but consistent with reason and justice; and if so, it may be pleaded as a custom antecedent to the memory of man, and it is so stated on the face of the record. The right of the burgesses has not been disputed, but the plaintiff alleges that they have a still further right than that of common of pasture, *viz.* the right of appointing herds, (of which the defendant was one), and allowing them a certain number of stints, by way of compensation for their trouble, in taking care of the cattle of the burgesses, depastured on the common; and if this formed part of the original grant, as is now determined by the verdict of the Jury, which appears to me to be just, equitable and reasonable, it removes all doubt, and is an answer to the objection that has been raised to the title of the plaintiff, as one of the burgesses, to an absolute right of common. Although such a right cannot be assigned, it may be pleaded by way of prescription, or as a grant; and, as it is a reasonable grant, it may well be the foundation of a prescription; and if so, the custom, as pleaded by the plaintiff, is a good and valid custom.

Mr. Justice PARK.—I think this case is concluded by the verdict. I do not say, that the plea in bar would have stood the test of a special demurrer; but the custom, as therein stated, does not only appear to be reasonable, but is perfectly consistent with good sense.

Mr. Justice BURROUGH.—We may assume that the grants to the burgesses and their herds, were coeval, and consistent. That *De Vesci*, the original lord of the manor, granted a right of common of pasture to all the burgesses of *Alnwick*, and, at the same time, allowed them to appoint herds to superintend and take care of the cattle depastured on the common, and also to appoint certain stints to

each of such herds, by way of remuneration for their services or trouble. It is quite clear, that such a grant would not be illegal; and although it has been said, that the word "reasonable," as to the number of herds and stints to be appointed, is indefinite and uncertain, still it could not be stated otherwise in the plea, as the numbers must vary according to times and circumstances, and the quantity of cattle depastured on the common; and the remuneration to the herds, for their services, must also vary accordingly. It therefore appears to me, that the finding of the Jury is conclusive, and that this rule must consequently be discharged.

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Mr. Justice GASELEE.—At the time of the first argument we felt a difficulty as to the finding of the Jury, some of the issues being inconsistent with others, and we therefore directed the *postea* to be amended, so as to confine the point to the avowry and plea now before us. The right of the burgesses to claim common of pasture on the *locus in quo*, is founded on prescription, and the defendant has so treated it in his avowry; and there is nothing on the face of the pleadings, to shew that the grants to the burgesses and to the herds were not one and the same grant, and made at the same time. Whether the plea in bar would have been good or sufficient, on special demurrer, it is unnecessary now to consider; neither is it necessary to decide the times at which the right was to be exercised, as the defendant, by the terms of his avowry, claims a right at all times of the year:—the plaintiff, therefore, need not set out what those precise times were; at all events, it was a question which the Jury were competent to ascertain. Taking, therefore, the whole of the avowry and plea together, it appears that there was a grant of common of pasture to the burgesses for their cattle *levant* and *couchant*, and also a concurrent right for them to appoint or employ herds, who were to superintend or take care of such cattle: there is nothing illegal in such a grant; and al-

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though it has been contended that it is bad, because it amounts to a grant *sans nombre*; still the number of the herds is to be specified, and they are to be nominated and appointed by a select body of the corporation; and we cannot assume that such body would appoint more than a reasonable number; or, if they had in fact done so, it might have been pleaded. So, if any of the allegations in the plaintiff's plea were untrue, the defendant might have traversed them; and as he has not done so, the contrary must be presumed. Besides, this is not a question between the lord of the manor and his tenants, or between the grantor and grantees, but between the burgesses and their herds; they stand upon the same ground: and as the Jury have found that the latter were entitled to certain stints, they have virtually established all the other allegations in the plea; and although it may be uncertain in terms, still there is no ground to arrest the judgment, or induce the Court to interfere after verdict. This rule, therefore, must be

Discharged.

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The defendant's attorney entered into the usual undertaking, under a Judge's order, to pay the plaintiff the amount of his debt and costs, on the proceedings being stayed; and the defendant died before taxation:— Held, that the attorney was still bound to perform his engagement.

#### HELLINGS, Gent., One &c. v. JONES.

A RULE was, on a former day in this Term, obtained by Mr. Serjeant *Pell*, calling on the defendant's attorney to shew cause why he should not pay the plaintiff the sum of 27*l.*, being the amount of the debt and costs in the suit, according to his undertaking.

Mr. Serjeant *Wilde*, afterwards shewed cause, on an affidavit stating, that, shortly after the writ was sued out, *viz.* in May, 1823, the defendant's attorney applied to the plaintiff to stay the proceedings in the action; which was done, under a Judge's order, in the usual form, on the attorney's entering into an undertaking to pay the debt and

costs; but that previously to the taxation, and before the time for putting in bail had expired, the defendant died insolvent; and it was contended, that his death discharged the attorney from his undertaking.

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Mr. Serjeant *Pell*, in support of his rule, submitted, that, as the defendant's attorney had undertaken to pay the plaintiff his debt and costs, and had entered into the usual engagement to that effect, he was bound to abide by his undertaking; particularly as the rule to stay the proceedings would not have been made absolute, had not the undertaking been given.

The Court having inquired of the Prothonotary, as to what was the usual practice in such cases, and he not being aware of any such having ever occurred, said, that they would confer with the Judges of the Court of *King's Bench* on the subject, and ascertain, if possible, whether such an instance had ever happened there; as it was fit that the practice of both Courts should be conformable.

*Cur. adv. vult.*

Lord Chief Justice *Bkr* now observed, that, on inquiry, it had been ascertained, that there was no settled practice on this point in the Court of *King's Bench*, nor could the officers of that Court recollect that such a case had ever occurred there. But (said his Lordship) we are of opinion, that, notwithstanding the death of the defendant, his attorney was bound to perform his engagement, as, by his undertaking to pay the plaintiff the debt and costs, he admitted the justice of his claim; and such admission of the attorney is equivalent to a judgment by default. This rule therefore must be made

Absolute, but without costs.

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*J. S.* having an account with the plaintiffs, bankers, on which he was indebted to them in 10,247*l.* 9*s.* 1*d.*, the defendant, in 1822, as surety for *J. S.*, executed a bond to secure the payment, to the plaintiffs, of any sums, which, for a certain period, they might advance to *J. S.*, not exceeding in the whole 5000*l.*;—and it was agreed that that bond was not to affect one which had been given by *J. S.* to the plaintiffs in 1817; but the defendant had no notice of the existence of the debt already due to the plaintiffs from *J. S.*—

*J. S.* afterwards became bankrupt, and was, at that time, indebted to the plaintiffs, on the old and new accounts generally, in the sum of 10,732*l.* 12*s.* 11*d.* The monies he had paid into the plaintiffs' bank, subsequently to the execution of the first mentioned bond, exceeded 5000*l.*; but, at

the time of paying those sums, it was not agreed that they should be placed to his credit, on either the old or the new account exclusively; and *J. S.* saw the accounts every fortnight, receiving the vouchers half-yearly:—Held, that the defendant was liable, to the extent of his security on the bond; and that the instrument was properly stamped with a 9*s.* stamp.

### WILLIAMS and Others v. RAWLINSON.

THIS was an action of debt, brought by the plaintiffs, bankers in *London*, against the defendant, one of the sureties, on a bond, dated the 7th *January*, 1822, in the penal sum of 10,000*l.* The defendant having craved oyer of the bond and condition, the latter was recited as follows:—

“Whereas one *John Threlfall* had for some time past had a banking account with the plaintiffs, carrying on business under the name and firm of *Williams, Burgess & Co.*, and the defendant and others (naming them) having agreed to join *Threlfall* in the bond, for the purposes and with such conditions as there under-written; and it having been expressly agreed between the above parties, that such bond should not in any wise prejudice or affect a certain bond, bearing date the 29th day of *November*, 1817, which was executed and given by the said *John Threlfall* and others to the above plaintiffs, and their late partner, *William Moffatt*, the younger, but that all rights and remedies under or by virtue thereof should remain in full force, virtue and effect.”

The condition of the above obligation was, that if *Threlfall*, his heirs, executors, or administrators, did and should, from time to time, and at all times thereafter, reimburse and fully pay and satisfy the plaintiffs, or the survivor or survivors of them, and every other person or persons who should or might become partner or partners with them, or either of them, in the banking business, their and each of their executors or administrators, all and every sum and sums of money, which the plaintiffs, or the survivor or survivors of them, or any partner or partners in their said banking business, should, within ten years from the date

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thereof, advance or pay, or be liable to advance or pay, for or on account of their accepting, indorsing, discounting, paying, or satisfying any bill or bills of exchange, drafts, notes, orders, or other engagements whatsoever, which he, the said *John Threlfall*, should, from time to time, draw, or cause to be drawn upon them, or make payable at their said banking house; and also all and every other sum and sums of money which the plaintiffs, or the survivor or survivors of them, or any partner in their banking business should, within the period aforesaid, otherwise lay out or advanced, or become in any wise liable to pay on the credit of the said *John Threlfall*, or on his account, to any person or persons whomsoever; and also all such charges and allowances for advancing and paying such bill or bills, drafts, notes, acceptances, advances, payments, engagements, and accommodations, *not exceeding the sum of 5000l.* *in the whole*, together with interest for such sum and sums of money, as they, or any of them, should at any time within the period aforesaid be in advance on account of the said *John Threlfall*, as is usually charged by bankers in such and the like cases; and should, from time to time, and at all times within the time or period, and to the amount, aforesaid, indemnify the plaintiffs, or the survivor or survivors of them, or any partner in their said banking business, from all and every action or actions, suit or suits, losses, costs, charges, expenses, and demands which should be occasioned by their accepting, indorsing, discounting, paying, or satisfying any bills of exchange, drafts, notes, or orders as aforesaid, for the said *John Threlfall* as aforesaid; then the bond was to be void and of no effect, otherwise to remain in full force and virtue."

The plaintiffs, in their replication, assigned for breaches of the condition of the bond, under the statute 8 & 9 *William 3*, c. 11, s. 8, that, after the making of the bond, and before the commencement of the suit, to wit, on &c., the plaintiffs had advanced and paid, and were liable to ad-

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vance and pay, a large sum of money, to wit, the sum of 20,000*l.* for accepting, indorsing, discounting, paying, and satisfying bills of exchange, drafts, notes, and orders, which *Threlfall*, during the time last aforesaid, had drawn upon, and made payable at, their banking-house; and also that they had otherwise laid out or advanced, and were liable to pay, on the credit of *Threlfall*, other sums of money, to a large amount, to wit, the sum of 10,000*l.*; and that the charges and allowances upon such advances, payments and engagements, together with interest thereon at the rate usually charged by bankers, amounted to a further large sum of money, to wit, the sum of 5000*l.*; and that the several sums so advanced and paid, and the charges upon them, amounted to a large sum, *exceeding the sum of 5000*l.** to wit, 35,000*l.* of all which said several premises *Threlfall* had notice; and yet that neither he, the defendant, nor any of the other obligors named in the bond, had reimbursed the plaintiffs the said last mentioned sum of 5000*l.*

At the trial, before Lord Chief Justice *Bent*, at *Guildhall*, at the Sittings after the last Term, the bond was produced, stamped with a 9*l.* stamp. It was proved, that the defendant and others executed the bond in question in *January*, 1822, as sureties for *Threlfall*, a banker in the country; that he had a previous banking account with the plaintiffs, and was indebted to them, on that account, in the sum of 10,247*l. 9s. 1d.*; and that a balance was accordingly struck for that sum at the time of the execution of the bond: but it did not appear that the defendant had any notice that *Threlfall* owed the plaintiffs that sum, when the bond was entered into. It also appeared, that, after the execution of the bond, the plaintiffs continued to make advances to *Threlfall*;—that he afterwards became bankrupt; and that, on the final close of the accounts, he was indebted to them in the sum of 10,732*l. 12s. 11d.* That *Threlfall* had, subsequently to the execution of the bond, paid into the plaintiff's banking-house sums considerably

exceeding 5000*l.*; but that he saw the accounts every fortnight, and received vouchers half-yearly, and also knew how the different payments were applied, but never raised any objection, or gave directions as to the mode of their application. Another action having been brought against another of the sureties on the bond, and the plaintiffs having recovered from him the sum of 1,022*l.*, the Jury found a verdict for the plaintiffs, which was assessed at 3,978*l.*, being the difference between the sum so recovered, and the sum of 5000*l.* mentioned in the condition of the bond. But leave was given to the defendant to move that the verdict might be reduced to 485*l.* 8*s.* 10*d.*, being the difference between the balance of 10,247*l.* 9*s.* 1*d.*, due from *Threlfall* to the plaintiffs at the time of the execution of the bond, and the balance of 10,732*l.* 12*s.* 11*d.*, due to them from him at the time of his bankruptcy.

Mr. Serjeant Cross accordingly, on a former day in this Term, moved to that effect, and submitted, *first*, That the bond was on a wrong stamp; as, if it were intended to secure successive advances of 5000*l.* each, or extend to floating balances during the whole ten years, it should have had a 25*l.* stamp, according to the statute 55 Geo. 3 (a), inasmuch as the sums secured would be indefinite and unlimited, the 9*l.* stamp being only applicable to a security for a

(a) Chap. 184, Schedule, Part 1, tit. "Bond." By which there is imposed on a bond given as a security, for the payment of any definitive and certain sum of money exceeding 4000*l.*, and not exceeding 5000*l.*, a stamp of 9*l.*; and on a bond, given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which might become due upon an account current, together with any sum al-

ready advanced or due, or without, as the case might be, where the total amount of the money secured, or to be ultimately recoverable thereupon, should be uncertain and without any limit, a stamp of 25*l.* And where the money secured, or to be ultimately recoverable therepon, shall be limited not to exceed a given sum, the same duty as on a bond for such limited sum."

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certain sum of money, not exceeding 5000*l.* (a). Secondly, That, according to the terms of the bond, the sums paid in to the plaintiffs' banking-house by *Threlfall*, subsequently to its execution, ought to have been applied, in the first place, towards the liquidation of the advances also made subsequently, and not in payment of the debt which had been previously due from him to them, and of which the defendant and his co-sureties were wholly ignorant at the time they became bound; as, although the object of the parties might have been, that the bond should operate as a floating guarantee, to cover a current account between the plaintiffs and *Threlfall*, still the condition of the bond only guaranteed dealings to the amount of 5000*l.*, and therefore the bond was satisfied by the payment of the first 5000*l.* by *Threlfall*; and it was never intended that it should extend to running dealings beyond that sum. At all events, it is clear, that it can be applicable to future advances only; and it could never be intended that the defendant was to make himself liable to the payment of an old balance, of the existence of which he was not even aware. And although it is an established principle, that general payments may be applied to the first item in an account between the original parties; yet that principle has never been enforced against sureties; and the plaintiffs were bound, as against the defendant and the other sureties on the bond, to have applied all the payments made by *Threlfall* subsequent to its execution, to the new account, and not to the credit of the previous balance, which, as between the plaintiffs and the sureties, must be considered as still remaining open.

The Court, being of opinion that the bond was properly stamped, the money secured thereby, or to be ultimately recoverable thereon, being limited to 5000*l.*;—a rule was granted on the last ground only.

(a) See *Scott v. Allopp*, 2 Price, 20.

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Mr. Serjeant *Wilde* now shewed cause, and, referring to *Clayton's* case (*a*), and the cases of *Brooke v. Enderby* (*b*), and *Bodenham v. Purchas* (*c*), submitted, that, according to the principles established by those cases, and there having been no specific appropriation, either by the plaintiffs, or by *Threlfall*, of the several sums of money paid by the latter into the banking-house of the former, in liquidation of the sums subsequently advanced, such payments must be taken to apply to the whole of the account generally. That it did not appear that there had been any express payments made in liquidation of the old account, or in reduction of the balance due at the time of the execution of the bond; nor could it be implied, for the defendant, as surety, that the sums remitted by *Threlfall* to the plaintiffs were to be applied by them towards the payment of the after advances, in preference to that of those made prior to the date of the bond; and that the defendant was, therefore, liable to the amount of the verdict found by the Jury, that being the extent of his responsibility on the bond; as the plaintiffs had an election, at all events, to place the sums remitted by *Threlfall* to his account generally, or to either the old or the new account. The learned Serjeant was proceeding with his argument, when the Court called on—

Mr. Serjeant *Cross* to support his rule.—He insisted, that the principles respecting the appropriation of monies, as between debtor and creditor, were inapplicable to the present case, as it depended on the intention of the plaintiffs, as obligees of the bond, and of the defendant, as standing in the mere character of surety for *Threlfall*; which intention was to be collected from the whole of the instrument, it being evident that the defendant did not mean to become security for past, but only for future advances to

(*a*) 1 Meriv. 572, 605.

(*b*) 4 B. Moore, 501.

(*c*) 2 Barn. & Ald. 39.

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be made by the plaintiffs to *Threlfall*; and this evidently appears from the recital to the condition, which not only refers to future advances alone, but also expressly states, that the new security, that is, the bond, should not prejudice another bond which had been previously given by *Threlfall* to the plaintiffs; whence, it must naturally be inferred, that the old debt was supposed to have been covered by the old security. And if it had not been so intended, it should have been so expressed in the condition, as was done in the case of *Bodenham v. Purchas*, viz. that the bond was given for the repayment of the balance of an old account, and of such further sums as the bankers might advance to the obligor. A surety may be looked upon in the light of an insurer, and the principles applicable to cases as between the assurer and the assured, may be made available for the defendant; and if any material fact were misrepresented or concealed from him at the time of executing the bond, the plaintiff could not be entitled to recover as against him. So, the same good faith which is required towards an underwriter, must also be observed with regard to a surety; for either a *suppressio veri*, or a *suggestio falsi*, will avoid a policy.

In *Pidcock v. Bishop* (a), it was agreed between the vendors and vendee of goods, that the latter should pay ten shillings *per ton* beyond the market-price, which sum was to be applied in liquidation of an old debt due to one of the vendors; and the payment of the goods was guaranteed by a third person; but the previous bargain between the parties was not communicated to him as such surety: and it was held, that this was a fraud on him, and rendered the guarantee void. And Lord Chief Justice *Abbott* there said, "that a party giving a guarantee, ought to be informed of any private bargain between the vendor and vendee of goods, which may have the effect of varying the

(a) 3 Barn. & Ores. 605; S. C. 5 Dow. & Ryl. 505.

degree of his responsibility." So here, had the defendant been fairly made acquainted with the fact of *Threlfall's* being indebted to the plaintiffs in so large a sum as 10,247*l.* 9*s.* 1*d.*, at the time the bond was entered into, he, in all probability, would not have consented to have become his surety; and it is, at all events, but fair and reasonable to presume, that he never would have been induced to do so, had he known that payments made by *Threlfall*, after the execution of the bond, were to be applied, in the first instance, towards the liquidation of the pre-existing debt, instead of towards that of the subsequent advances, which were to be made, in part, on the faith of the defendant's responsibility. As well, therefore, from the whole course of the transactions between the plaintiffs as obligees of the bond, and *Threlfall* as the principal, as considering the intention of the parties, the defendant, as surety, cannot in law or justice be held liable to the amount of the verdict found against him.

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**Lord Chief Justice Best.**—This case has been most ably and ingeniously argued by my brother *Cross*, for the defendant, upon the only ground on which it could possibly be supported; and I agree with him, that if I could collect, on the face of the bond, that it was the intention of the parties that the sums paid by *Threlfall* into the plaintiff's banking-house, subsequently to the execution of that instrument, should be applied to the new account, and no part of it appropriated in liquidation of the old balance, the rule for reducing the verdict must be made absolute. No such agreement, however, appears on the bond, but the contrary; and it is not reasonable to suppose, that the plaintiffs intended to have entered into such an agreement, or to accept of the defendant as a surety for *Threlfall* on any such terms; for if they had done so, the sum of 10,247*l.* 9*s.* 1*d.*, being the amount of the balance struck and due from *Threlfall* to the plaintiffs, pre-

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viously to the execution of the bond, might never have been paid off, as that instrument must be taken to apply, and be confined, to all monies received by the plaintiffs on account of the new debt, without any reference to the old. And in the absence of any agreement as to the appropriation of subsequent payments by *Threlfall*, as the principal, it is quite clear that the plaintiffs had a right to apply them, in the first instance, in discharge or liquidation of the old balance, and not carry them to the new account; and if so, there is an end of the question. The condition of the bond recites, that *Threlfall* had a previous banking account with the plaintiffs, the obligees; and that the defendant and others had agreed to join him in the bond, for the purposes, and on the conditions thereunder written. And it was further recited, that it had been expressly agreed between the parties, that such bond should not, in any wise, prejudice or affect a certain bond which had been previously executed, and given by *Threlfall* and others to the plaintiffs, as obligees, and their late partner, but that all rights and remedies, under and by virtue thereof, should remain in full force and effect. *Expressio unius est exclusio alterius*; and it is evident that the bond in question was not intended to prejudice the bond which was given in November, 1817. And although it is not quite clear, from these words, that that instrument was still to stand in full force, so as to entitle the plaintiffs to sue on it, yet I cannot collect that there was any agreement, that monies subsequently received by the plaintiffs, or paid into their banking-house by *Threlfall*, should not be applied in paying off the balance of the old account. It also appears, that when these payments were made by *Threlfall*, nothing was said as to which account they were to be applied to; and if both the accounts were blended together, it is evident that the plaintiffs had a right, according to the course of business, to apply them to the earlier items, or balance struck before the bond in question was

entered into. The only difficulty then is as to the liability of the defendant as surety; for, if this were a case between debtor and creditor, there could be no doubt as to the plaintiffs' right to apply the subsequent payments to the old balance; and it is now too late to shake the authorities on which that principle has been established; which was most clearly laid down in *Clayton's* case, and recognized and confirmed by the Court of *King's Bench*, as well as by this Court, in the subsequent cases of *Bodenham v. Purchas*, and *Brooke v. Enderby*. Here, too, the plaintiffs were bankers, and had a right, according to the recognized and uniform course of trade, to apply payments made by a customer to an old debt, if no specific appropriation were made by the party remitting; and it appears to me that the accounts between the plaintiffs and *Threlfall* must necessarily have been blended. One fact is extremely strong against the defendant, *viz.* that his principal agreed to the application of the payments by the plaintiffs to the old balance, as he saw the accounts every fortnight, and received vouchers half-yearly; and he must consequently have seen, when the first half-year's vouchers were sent in, that the sums remitted by him, subsequently to the giving of the bond, had been applied by the plaintiffs in liquidation of the old balance. If, therefore, the principal consented to such an appropriation, there is an end of the question; for he had clearly an option as to which account the payments should be applied to, and he alone had an unfettered right in this respect, and over which the defendant, as surety, could have no control; unless there were an express or distinct agreement entered into at the time of the execution of the bond, which cannot be collected, or even inferred, from any thing that appears on the face of that instrument. The case of *Pidcock v. Bishop* does not appear to me to be at all applicable to the present, as the bargain there was altogether of a different nature, and

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the whole of the transaction between the debtor and creditor was a direct fraud on the surety; as they entered into a secret agreement, by which the debtor consented to pay a considerable sum beyond the market-price of the goods furnished, in satisfaction of an old-standing debt due to his creditor; and it was most rightly decided that such agreement was a fraud on the surety, and discharged his liability. Here, however, there is no pretence to impute any fraud to the plaintiffs at the time the bond was given, either on the face of that instrument, or from the facts proved at the trial. It has been said, however, that as the defendant is a mere surety, he must be considered as standing in the same situation as an underwriter, or that his undertaking may be considered as analogous to a case of insurance, in which, according to the doctrine of Lord *Mansfield*, the transaction must always be *uberrima fides*: yet, when his Lordship laid down that as a governing principle (a), he referred to *Cicero*, who says, "*aliquid est celare, aliquid tacere* (b). That, however, cannot apply to the present case, as here there was neither fraud nor an improper concealment; and if there had been, the defendant might have pleaded it, and, if established, we should, of course, have relieved him. But, on the contrary, it appears to me, that the bond in question was given expressly to secure the payment of an old banking account. The plaintiffs had a debt outstanding against *Threlfall* the principal, as their customer; and, according to the well-known practice existing between bankers and their customers, payments are not carried on to a new account until the old balance has been either liquidated or secured. No injustice will be done by our holding the defendant liable to the amount of the verdict found by the Jury, which is in strict conformity with the terms of the condition of the bond.

(a) See *Carter v. Boehm*, 3 Burr. 1910.

(b) *Cic. de Officiis*, lib. 3, c. 12, 13.

Mr. Justice PARK.—There appears to me to be no colour whatever to reduce the verdict found by the Jury. The merits of the case have been so fully gone into by my Lord Chief Justice, that I need only make a few observations. If there had been any fraud, or undue concealment, at the time the bond was entered into, the question would have been wholly different; and the case of *Pidcock v. Bishop* might have applied, which was decided on the ground, that the withholding the knowledge of a bargain, secretly entered into between the debtor and creditor, previously to obtaining the guarantie of a third party, was a fraud on him, and rendered his guarantie void, as such bargain might have the effect of varying the degree of his responsibility. Here, however, all the plaintiffs did, when they required the bond in question, was warranted by the usual course of trade; and unless there were an express agreement between the parties, the plaintiffs had a right to apply the payments made by *Threlfall*, after the execution of that instrument, to the old account.

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Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—I feel great difficulty in this case, and am not prepared to say, that the judgment of the Court is altogether satisfactory, and I cannot fully acquiesce; but, as there is no authority the other way, I am not, in strictness, authorized to entertain a different opinion. By the terms of the condition of the bond, it appears to me, that it was the intention of the sureties, that they should only be liable for future advances made by the plaintiffs to *Threlfall*; and these having been confined to a sum not exceeding 5000*l.*, there can be no doubt but that their liability was intended to be confined to that amount, for monies to be advanced on *Threlfall's* account, within ten years from the day of the date of the bond; and if all the sums subsequently paid by *Threlfall* were

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to be applied to the new account, they far exceeded the sum of 5000*l.*, for which the defendant, as surety, could only be liable. It is recited, that a previous bond was given by *Threlfall* and others to the plaintiffs, and their late partner, and that the bond executed by the defendant should not prejudice or affect that security. It therefore does not appear to me to be clear, that it was not the intention of the parties to the latter bond, that all sums paid in by *Threlfall*, subsequent to its execution, should not be carried to the new account; or that the plaintiffs should not rely on their former bond for the payment of the old balance, as the obligors might be called on individually at any time to pay such balance, according to the terms of that security. Although the subsequent payments might, according to the usual course of business, have been applied by the plaintiffs in liquidation of the old account, yet the question is, whether, by taking the new bond, they did not intend to adopt this course, *viz.* that, in consideration of the defendant's becoming surety to the amount of 5000*l.*, they would not apply to *Threlfall* for the payment of the old balance, until ten years had expired from the day of executing the new bond. Nothing was proved at the trial to shew the terms or nature of the outstanding security; or to raise a presumption that there had been any improper concealment, by the plaintiffs, of the balance then due to them from *Threlfall*; indeed such could not have been the case, as it expressly appeared by the recital to the condition. Had the bond stated the existence or amount of the former balance, there would have been no difficulty whatever; and although I am not perfectly satisfied, yet, as I have no sufficient authority to guide me, I concur with the Court in thinking, that, under all the circumstances, this rule must be

Discharged (*a*).

(*a*) See *Simson v. Ingham*, 2 *Cooke*, 8 B. Moore, 588; *S. C. 1 Barn. & Cres.* 65; *Simson v. Bing*. 452.

Mr. Serjeant *Cross* then applied for a rule, calling on the plaintiffs to shew cause why the judgment should not be arrested, on the ground, that *Threlfall* ought not to have been allowed by the plaintiffs to be in their debt, at any one time, in a sum exceeding 5000*l.*; as the terms of the condition were, that if he should reimburse the plaintiffs all sums which they should advance, not exceeding 5000*l.* *in the whole*, the bond was to be void; whilst the replication, in which the breach of the condition was assigned, alleged that the advances made by the plaintiffs, after the making of the bond, and before the commencement of the action, exceeded 5000*l.*, to wit, 35,000*l.*; and, if such advances had been limited to 5000*l.*, *Threlfall* might never have been involved in difficulty, and the defendant never called on to pay the amount for which he had become surety; for though the latter might have known enough of *Threlfall* to be induced to incur a limited responsibility for him; yet he, of course, would not have signed the bond, had he imagined that the advances were not to be restricted to the sum of 5000*l.* in the whole.

The Court, however, held that there was nothing in the objection; the condition of the bond clearly meaning, that the defendant should guaranty the plaintiffs, as bankers, to the extent of 5000*l.*, although they might think proper to make advances to *Threlfall* beyond that amount, as it was in the nature of a continuing garantie, to secure the payment of that sum at all events.

Rule refused.

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## PIKE v. CARTER.

THIS was an action of trespass, for taking the money of the plaintiff, to which the defendant pleaded the general issue.

At the trial, before Lord Chief Justice Abbott, at the last *Summer Assizes* for the county of *Southampton*, a verdict, by consent, was found for the plaintiff, damages, 6*l.* 14*s.* 6*d.*, subject to the opinion of the Court upon the following case:—

“The plaintiff was, at the time of the trespass complained of, and still is, the treasurer of a friendly society called “The General Union Benefit Society,” holding its meetings at *Portsea*, within the borough of *Portsmouth*. The defendant was a justice of the peace for the borough of *Portsmouth*.

“The General Union Benefit Society was instituted in the year 1818; and the rules of the society (which were to be considered as part of the case, and referred to, if necessary,) were allowed and confirmed at the General Quarter Sessions of the peace, holden, in and for the county of *Southampton*, at *Winchester*, on the 25th *October*, in that year. Among these rules was the following:—

‘In order to settle any case in dispute between this society and any of its members, their executors, administrators, or other person or persons claiming under any member or members, relating to the breach of any clauses of these regulations, or the withholding of the benefit, or expelling any member from the society, or on any other account;—it is hereby finally agreed, that the dissatisfied party or parties shall have such case fairly arbitrated, upon leaving notice at the society-house, within two months after such dispute or notice of expulsion, if such dissatisfaction was made conclusive, without being subject to the control of the magistrates.

fied party or parties live within three miles from the society-house; but if such dissatisfied party or parties live more than three miles from the society-house, then within three months after such dispute or notice of expulsion; and for that purpose such dissatisfied party or parties shall choose three persons, who are members of this society, and the audit or general committee shall choose three other members of this society: and the six members so chosen, or the majority of them, shall appoint three more members of this society; which nine members, so appointed, shall act as arbitrators, and meet and consider the case in dispute, within one month from the time the notice of such arbitration was so left at the society-house. And whatever award, order, or determination shall be made by the said arbitrators, or the major part of them, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without appeal, or being subject to the control of two or more justices of the peace; provided such an award be made in writing by the said arbitrators, or the major part of them, within one hour next after such case shall be determined. Any person desiring his case to be arbitrated, shall deposit in the hands of the treasurer, 10s. 6d.; and, in case such arbitration shall be given in his favour, the 10s. 6d. shall be returned, and the expences paid by the society: but if the case be decided against him, the expence shall be paid from the deposit.'

"In 1818, one *Thomas Spraggs* was admitted a member of this society; and in September, 1823, he, having then been for some months in the receipt of relief from the society, applied for further relief, which was refused, on the ground of an alleged violation by him of one of the rules of the society. In consequence of this refusal, he, upon two several occasions, applied to the magistrates of *Portsmouth*, who, having duly summoned the officers of the society, made two several orders for his relief, (which orders were to be referred to, if necessary, as part of the case),

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and which not having been complied with, the defendant, as a magistrate, signed two several warrants of distress, under which money collected from the society, and vested in the plaintiff, as treasurer, was, on the 6th *December*, 1823, and on the 27th *February*, 1824, forcibly taken from a box in the custody of the plaintiff, as such treasurer of the society. On the 10th *April*, 1824, the plaintiff, by his attorney, gave the defendant a notice, duly signed and indorsed, according to the statute in that behalf (a); and on the 12th *May*, 1824, the present action was commenced by suing out a writ in this Court.

"At the trial, no evidence was offered on either side; but it was agreed between counsel, that the admissibility of any of the evidence should be open to argument on the case."

"The question for the opinion of the Court was, whether this action could be maintained. If they should be of opinion that it could, then the verdict was to stand; if not, a verdict was to be entered for the defendant."

The case came on for argument on a former day in this Term.

Mr. Serjeant *Bosanquet*, for the plaintiff.—By the terms of the rule of the society set forth in the case, and according to the statute 33 Geo. 3, c. 54, (which was passed for the encouragement and relief of friendly societies, and by which any number of persons might form themselves into a society, and raise among themselves a fund for their mutual benefit, and make rules, and impose fines, on the several members of such society), the defendant, as magistrate, had no jurisdiction to issue the warrants of distress under which monies, vested in the plaintiff, as treasurer, were taken, and for which this action is brought; as some of the members of the society, on being duly chosen and appointed, were authorized, in cases of complaint by

(a) 24 Geo. 2, c. 44, s. 1.

any of its members, to act as arbitrators, and proceed to the settlement of all disputes in a summary way; and their award was to be conclusive on all parties, and final, without being subject to the control of justices of the peace. The 15th section of that statute (*a*), gives a jurisdiction to magistrates, in case any member of a benefit society shall consider himself aggrieved by any act done or omitted to be done by the society; yet by

(*a*) By which it is enacted, that "if any person, having been admitted a member of any society established by virtue of the act, shall think himself aggrieved by any act, matter, or thing done, or omitted to be done by any such society, or any person or persons acting under them, it shall and may be lawful for any two or more justices of the peace of the county, riding, division, or shire, where, or near unto the place where, such society shall be established, on complaint made upon oath, or affirmation, by or on the behalf of such person, (which oath or affirmation such justices of the peace are thereby empowered and required to administer), to issue their summons to the presidents, wardens, stewards, or other principal officers of such society, by whatever name such principal officers shall be respectively named or called, or one of them, in case such complaint shall be made against such society collectively, and in case such complaint shall be made against any person or persons appointed to such office or offices, then to summon such person or persons to appear before such justices, at a convenient time and place, to be re-

spectively named in such summons, and also to summon, at the same time and place, if there shall be occasion, all such persons as shall appear to such justices to have the custody of the rules, orders, and regulations of such society; and such justices, at the time and place named in such summons, whether the person or persons so summoned shall or shall not appear according to such summons, nevertheless, on proof, upon oath or affirmation, of such summons being duly served, or left at his, her, or their usual place or places of abode, shall proceed peremptorily to hear and determine, in a summary way, the matter of such complaint, according to the true purport and meaning of the rules, orders, and regulations of such society, confirmed by the justices according to the directions of the act, and shall make such order therein as to them shall seem just; and every such order of such justices shall be complied with, and to all intents and purposes shall be final, and shall not be subject to appeal, or to be removed or removable into any of his Majesty's Courts of Record at *Westminster*."

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the 16th section (*a*), this case is expressly provided for; and the rule, directing all disputes to be referred to arbitration, confirmed.

It is highly important to all societies of this description, that litigation should be avoided; and rules are accordingly framed, and provisions made, under the sanction of the Legislature, giving the members a jurisdiction within themselves, to which all are bound to submit, and which is unknown to the rules of the common law. In passing the statute in question, the Legislature did not contemplate, that disputes arising between members of a society of this description should be settled as in other cases; and although the 15th section of that statute contains a general provision, giving to magistrates a summary jurisdiction in some cases, yet the 16th section provides, that a domestic *forum* shall be established, by which all matters in dispute, between the society and any individual members thereof, may be adjusted, without a reference to any extrinsic authority, by expressly enacting, that if provision be made by the general rules of the society for a reference by arbitration (as in this case), the matter in dispute shall be referred to arbitrators, according to the manner prescribed by such general rules, whose award shall be binding and conclu-

(*a*) By which it is provided, "that if provision shall be made by one or more of the general rules or orders of any such society, and confirmed as required by the act, for a reference by arbitration, of any matter in dispute between any such society, or any person or persons acting under them, and any individual members thereof, the matter so in dispute shall be referred to such arbitrators as shall be named and elected, in such manner as shall be prescribed by such general rules or or-

ders; and whatever award, order, or determination, shall be made by the said arbitrators, or the major part of them, according to the true purport and meaning of the rules and orders of such society, confirmed by the justices according to the directions of the act, shall be binding and conclusive on all parties, and shall be final, to all intents and purposes, without appeal, or being subject to the control of two or more justices of the peace, in the manner thereinbefore prescribed."

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sive on all parties, and final, to all intents and purposes, without being subject to the control of two or more magistrates. The enactment is peremptory in its terms, and, consequently, altogether takes away the jurisdiction of the magistrates; for the award of the arbitrators is to be final to all intents, and is not even subject to appeal. It must, therefore, be taken in this case as if the 15th section had not been introduced into the statute, or as though it had never existed, the rule of the society having been made for the specific purpose of adopting the plan pointed out by the 16th section. The prudence or beneficial effects of such a rule cannot now be questioned. When an individual becomes a member of such a society, he subjects himself to all its rules, if they be, as the rules here were, duly allowed and confirmed by the magistrates, according to the directions of the statute; and those rules cannot be dispensed with, but are conclusive and binding on all parties. By the rule in question, if a person, desiring his case to be submitted to arbitration, neglect or refuse to deposit 10*s. 6d.* in the hands of the treasurer, it is clear that he cannot afterwards apply to a magistrate, as the mode of adjustment is pointed out by the rule, which admits of no application to a magistrate, and no appeal. There is nothing in the regulation at all illegal or unreasonable. Two persons may agree to refer matters in difference between them to a third; and that submission would not only be legal, but would also be binding on both. So here, where a person voluntarily becomes a member of the society, he virtually consents to submit himself to, and engages to observe, all the rules and regulations which may be legally imposed on the members collectively, for their internal management and regulation.

Mr. Serjeant *Wilde*, for the defendant.—The 16th section of the statute does not take away the jurisdiction of the magistrates, unless the award be duly made and

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confirmed. And although it has been said, that the object of the Legislature in passing the 33 Geo. 3, was to prevent litigation, still the statute must receive a general construction. It cannot be doubted, but that magistrates would better protect the rights of each individual member, than those persons who are interested and form part of the body of the society. Persons who become members of societies of this description seek, by that means, to provide themselves with those necessaries in times of sickness and distress, which they are unable to procure through their own exertions: and the relief to be afforded them should be promptly enforced; otherwise, if they be obliged to wait until the arbitrators have made their award, according to the terms of the rule in question, that assistance might come too late: and although, by that regulation, the award must be considered conclusive and final, still it will not prevent the party from applying to a magistrate, particularly as the half-guinea required to be deposited by him, previously to his case being submitted to the arbitrators, might often prove more than the amount claimed from the society for his immediate wants. He has, therefore, a right to elect whether or not he would go before the arbitrators; and it would be too much to say, that he should be compelled to do so, when such reference is to be made to persons who are themselves members of the society, and, consequently, in some degree interested in the result. Besides, in the regulation, it is not stated how the performance of the award is to be enforced, or at what time the whole of the nine members are to make their award, or whether they may examine the parties before them or not. It is evident, that, by delay, a member would be denied that justice which ought to be afforded him: and in the case of *Sharp v. Warren* (a), it was held, that the statute 33 Geo. 3, c. 54, s. 8, giving a summary remedy,

though in terms apparently prescribing such remedy, is cumulative, and does not take away the previous right to sue by action at law. So here, although some of the members of the society, duly chosen and appointed, might arbitrate, in cases of dispute between the society and any of its members, in certain respects, still, if such reference be not made and acted on, it does not oust the jurisdiction of the magistrates under the 15th section of the statute.

*Cur. adv. vult.*

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Lord Chief Justice Best now delivered the judgment of the Court; and, after reading the whole of the case, which he stated to be necessary, in order to render the conclusion to which they had arrived intelligible; and, adverting to the orders of the magistrates for the relief of *Spraggs*, appended to the case, *which were to be referred to, if necessary*, as forming part of it, said:—It is only requisite to advert to one fact, which appears on the face of these orders, *viz.* that, when the parties were first summoned before the magistrates to shew cause why the two orders relating to *Spraggs* should not be made, (the first, that he might be re-instated as a member of the society, and the second, that he might be paid a weekly allowance by way of relief), it was stated on the first of them, that two of the officers of the society attended on its behalf, the one in person, and the other by attorney, *and made no defence*; although it is stated on the face of that order that the magistrates heard the information on oath: and, on the second, that, although the same officers were summoned, they did not attend, nor did any one attend on behalf of the society; but that the charge was again proved on oath. Under these circumstances, it is not necessary for the Court now to decide, whether *Spraggs* were bound to apply for an arbitration, according to the rule of the society referred to, or whether it were imperative on him to do so or not; for this action

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cannot be maintained, on the grounds, that trespass will not lie against a public officer for any thing done in the discharge of his duty, unless the facts necessary to enable him to form a correct judgment be all presented to him at the time. Here, it appears that no defence whatever was made on behalf of the society; nor did the officers, who attended on the part of its members, call the attention of the magistrates to the particular rule in the articles, by which a reference to arbitration, in case of disputes, was directed to be made. It is expressly stated on the face of the first order, that *they made no defence*. It would be a great hardship, as well as a violation of an apposite rule of law, if a magistrate, in the exercise of his public duty as such, should be suffered to be entrapped in this manner, so as to make him a trespasser, unless he had been made acquainted with all the previous circumstances of the particular case in which he was called on to act; for, in order to make him a trespasser, all the circumstances, as well touching the complaint made as the nature of the defence, should be expressly, and without concealment, stated to him at the hearing.

On referring to the statute 33 Geo. 3, c. 54, on which the present question arises, it may be fairly presumed, although it might have been considered good policy to encourage societies of this description, that the proposers of the measures therein contained have since altered their opinions, when it has been found, that, so far from its having tended to relieve poor and indigent persons who have contributed, towards the funds of such societies, a large portion of the produce of their labour, as a provision against the infirmities incident to age and sickness, it has frequently happened that the finances of these societies have been wantonly and improvidently dissipated and squandered away in useless litigation; and that those poor and needy people, who have often suffered the severest privations in order to contribute their mites

to fill the society's coffers, on application for that relief which they have a just right to claim from the funds, find the treasurer without treasure and all their hard-earned savings vanished.

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By the 15th section, however, of the statute, magistrates have a general jurisdiction to act in all cases concerning societies, whose rules have been confirmed according to the provisions of that statute; but the 16th section creates an exception in cases where the rules of the society contain an article or provision for a reference to arbitration, in cases of disputes between any such society and any individual members thereof, and that, when the matter so in dispute shall be referred, and the award made by the arbitrators, it shall be binding and conclusive, without being subject to appeal, or to the control of the magistrates, in the manner previously prescribed by that statute. It is quite clear, that magistrates have, by the 15th section, such a general jurisdiction; and although the 16th makes an exception, yet when a person wishes to avail himself of it, he is bound to shew that his case falls expressly within it. Here, if the treasurer or officers of the society had produced before the magistrates the rule in question, which enabled them to refer their disputes to arbitration, they would have been enabled to determine, whether, in itself, it were so conclusive and binding as to deprive them of their jurisdiction; but it appears, on the face of both the orders, that no defence was made, nor was the attention of the magistrates called to the effect or operation of the rule, nor was any objection made as to their jurisdiction or power to act in this particular case. Their attention appears to have been merely called to the information which was made before them on oath, and to that alone. If the rule of the society might be considered as forming part of the general law of the land, a magistrate, in the course of his duty, would be bound to take notice of it; but it cannot for a moment be contended, that he was bound to be ac-

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quainted with the private regulations of a society of this description. Supposing that the statute had not been passed, or that the defendant had pleaded his general jurisdiction to act as a magistrate, under the 15th section, according to the rules and regulations of the society, confirmed by the magistrates and enrolled at the Sessions; and that the applicant, *Spraggs*, had made a complaint; and that he, the defendant, had, as a magistrate, adjudicated on it; the plaintiff must have replied by setting out the rule or regulation of the society, which directed the reference, and averring that the defendant had due notice of the existence of such rule.

There is a material difference, where a party relies on an exception to a general law, and where not. In the former case it need only be negatived, and the burthen is then on him to shew that his case falls within it; but in the latter, no notice whatever is required to be taken of it. This case may be likened to that of a privileged person, who, on being arrested, omits to state that he is privileged, or does not inform the officer of the ground of his exemption at the time. In such a case, it is quite clear, that trespass would not lie against the officer. So, if a person be exempted from arrest by reason of his residing within the ambit of a local jurisdiction, he cannot maintain an action against the officer arresting him, unless he had apprised him, at the time, that he was privileged on account of such residence. So, if a person be exempted from serving a particular office, and on being called before a magistrate to shew cause why he refuses to do so, if he do not inform him of the particular ground of his exemption, he cannot maintain an action against the magistrate who orders proceedings to be taken against him in consequence of such refusal. If there were no decision on the subject, it appears to us that this action could not be maintainable, either on the principles of law, or of common sense or justice. There is, however, a decision which falls expressly within the view we now take of this case; for in

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*Louth v. The Earl of Radnor* (a), where the question arose on the statute 20 Geo. 2, c. 19, giving magistrates jurisdiction to determine differences between masters and servants in husbandry, and other labourers, respecting wages, it was held, that trespass would not lie against magistrates acting upon a complaint made to them on oath, by the terms of which it appeared that they had jurisdiction, although the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, he having notice of such complaint, and being duly summoned to attend; and Lord *Ellenborough* there said (b), “the facts stated in the case are not stated as facts appearing before the magistrates at the time; and in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates before whom he had notice to appear. For how, otherwise, could the magistrates be affected as trespassers, if the facts, stated to them upon oath by the complainant, were such whereof they had jurisdiction to enquire, and nothing appeared in answer to contradict the first statement?” And Mr. Justice *Grose* said, “my doubt is, whether, in this case, we can take notice of any thing but what appears upon the face of the order.” And Mr. Justice *Lawrence* added, “if the magistrates made an order against the evidence laid before them, the party injured would have another sort of remedy against them.. But here, it is shewn, that a certain complaint was made to them on oath, which, as it appears on the face of the order, is valid in law; and of this the plaintiff had due notice. If, then, he would complain of what was done upon it, he ought to have shewn, that the facts on which he now relies were proved before the magistrates. But he cannot make them trespassers, by shewing that the real facts of the case will

(a) 8 East, 113.

(b) Id. 119.

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not support the complaint, unless such facts were proved before them at the time." There the Court of *King's Bench*, decided, that all the facts necessary for a magistrate to form a judgment, as to the course he ought to pursue, should have been presented to his mind, before he could be considered a trespasser. Now, in this case, it appears that nothing of that sort was done, as the rule of the society, directing the reference of disputes to arbitration, was not presented to the notice of the magistrates, when the orders for the relief of *Spraggs* were made, nor was their jurisdiction, as such magistrates, questioned at the time. Without, therefore, touching on the question as to whether the 16th clause of the statute 38 Geo. 3, c. 54, be imperative, or not, on a dissatisfied member to submit to a reference to arbitration, we are of opinion that the present action cannot be maintained, as it falls expressly within the principle established in the case of *Lowther v. The Earl of Radnor*, and there must consequently be

Judgment for the defendant (a).

(a) See the statute 3 Geo. 4, c. 23, which gives a general form of conviction where no particular form is provided, and enacts, that "one Justice shall be competent to receive the original information or complaint, where two or more

Justices are empowered to hear and determine; and that where the merits have been tried, convictions shall not be set aside for defect of form." See also *The King v. Soper*, 3 Barn & Cres. 857.

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**STEAD, DOKER, JACKSON, WAINWRIGHT, and SOWDEN v.  
SALT.**

*Friday,  
May 13th.*

THIS was an action of *assumpsit*, in which the plaintiffs declared against the defendant for work and labour done and performed by themselves and their servants, and for divers other necessary things used and applied by them in and about such work and labour. To this were added the common money counts. The defendant pleaded the general issue.

The cause was tried before Mr. Justice Bayley; at the last Assizes at York, when an award was put in by the defendant, by which an arbitrator had determined the matters referred to him, and awarded a certain sum to be due from the defendant to the plaintiffs, for the work done, which was the subject of the present action; and which sum the defendant had paid into Court. But it appeared that the submission, which was made by articles of agreement, not under seal, was signed by the defendant and the three first named plaintiffs only, for the whole five; but that the other two were not parties to it. It also appeared that the plaintiffs were not general partners, and that the work in question was performed by them on a joint undertaking, which was confined to the particular contract, *viz.* the building of certain houses, and that they were not general partners. The question was, whether the account which the plaintiffs had sent in to the defendant, for the work done, had been settled by the terms of the award.

The learned Judge was of opinion that the submission was insufficient; and a verdict was accordingly taken for the plaintiffs, with leave for the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the submission was binding on the plaintiffs.

Mr. Serjeant Pell, on a former day in this Term, ac-

Three of five  
partners signed  
a submission to  
arbitration:—  
Held, that it did  
not bind the two  
who had not  
signed, although  
the subject matter  
referred  
arose out of the  
business of the  
firm; it not be-  
ing within the  
ordinary course  
of transactions  
in trade be-  
tween partners.

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cordingly applied for a rule *nisi*; and contended, that the award made under the above submission was a conclusive answer to the plaintiffs' action; and that no valid distinction could be made between a general partnership, and a partnership which is confined to a particular contract or undertaking;—that an admission by one of several partners is binding as against all; and a payment to one will operate as a discharge of a debt due to the whole; so a release of such debt executed by one, is valid as against the others. So also a release of an action. That each of the plaintiffs had authority to act for all the others, in all matters relating to the work carried on by them; and either of them might have commenced an action against the defendant in the name of the whole, and insisted on payment, as the act of one would be binding on all; that if the defendant had brought an action against one of the plaintiffs alone, he might have pleaded, in abatement, the non-joinder of the others; and that, as the submission expressly related to the business done by all the plaintiffs, and three signed it for themselves and the other two, it was binding on all, and must be considered as though it were made in the ordinary course of trade between general partners.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Wilde* afterwards shewed cause.—There can be no pretence whatever for disturbing this verdict, as no evidence was adduced, at the trial, to shew, that the three plaintiffs who signed the submission had any authority from the other two, to enable them to do so; the submission, therefore, cannot be binding on all. Although in *Strangford v. Green*(a) it was held, that one partner might submit to a reference for another; and that if he signed an arbitration bond for himself and partner, a refusal by the latter to perform the award was a breach of the condition, though he

were not a party to the submission. Yet here the signing of the submission was not an act falling within the ordinary course of the plaintiff's business. It is a mere delegation of an authority. The plaintiffs might be called on, by the arbitrator, to perform acts which the law would not require of them; or the award might render them liable to the defendant for matters extrinsic, and foreign to the transactions wherein they were concerned as partners. One partner cannot bind another by deed, unless he have the express authority of the other to do so; when it may be considered as the act and deed of both. Suppose the three plaintiffs, who signed the articles of agreement, had died, the two, who were no parties to it, could not be bound by it, nor could they be compelled to comply with the terms of the award, they not having done any act amounting to an assent to the submission. Besides, the plaintiffs in this case must be considered, not as partners generally, but as joint-contractors; and, therefore, although one of them might bind the whole in matters relating to their joint interest in the particular transaction or contract, still he could not go beyond the scope of such joint interest, so as to bind them in any thing not necessarily connected therewith: and it is quite clear, that a submission to arbitration cannot be considered within the ordinary course of dealing between partners, and still less so as between joint-contractors.

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Mr. Serjeant *Pell*, in support of the rule.—All the plaintiffs being partners in this particular transaction, the act of one binds the whole, as to the subject matter of their joint dealings, to which alone the submission and award referred. The only purport of the reference was, to ascertain what was due to the plaintiffs, from the defendant, in respect of the work done; and if one of them had stated that it amounted to 20*l.* only, the defendant would not have

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been liable beyond that sum. In *Sandilands v. Marsh* (*a*), where one of two partners made a contract as to the terms on which any business was to be transacted by the firm, although such business was not in their usual course of dealing, and even contrary to their arrangement with each other, and the business was afterwards transacted by, or with the knowledge of, the other partner,—it was held, that he was bound by the contract made by his partner: and Mr. Justice *Bayley* there said (*b*), “it is true, that one partner cannot bind another out of the regular course of dealing by the firm. But, where the assurance has reference to business transacted by the partnership, *although out of the regular course*, it is still within the scope of his authority, and will bind the firm.” So, a submission to arbitration, on matters arising out of a joint contract or undertaking, is as much within the scope of a partnership authority, as if a general partnership had existed between the parties. And in *Comyns's Digest* (*c*) it is said,—“if there be a controversy between *A.*, of the one part, and *B.* and *C.*, of the other, and *B.* submit for himself and *C.*, and there be an award that *B.* shall pay;—this is good, though *C.* be a stranger.” And *Rolle's Abridgment* (*d*) is cited as an authority in support of this position—So, if *B.* submit for himself and his partner, and the award is that *B.* pay (*e*). So, if two submit on one part, and one on the other, one of those two may revoke without the other (*f*). On principle, therefore, as well as authority, the award is a conclusive answer to this action.

*Cur. adv. vult.*

(*a*) 2 Barn. & Ald. 673.

(*e*) 2 Mod. 228.

(*b*) Id. 679.

(*f*) Com. Dig. tit. “Arbitra-

(*c*) Tit. “Arbitrament,” (D 2).

ment,” (D 5).

(*d*) Vol. I, p. 244, (L 20).

Lord Chief Justice BEST now delivered the judgment of the Court as follows:—It appeared, on the trial of this cause, that the five plaintiffs were joint-contractors, and had undertaken to build certain houses for the defendant, who was to pay them for their labour in so doing; and the only question was, whether their right of recovering were barred by an award that had been made with respect to the subject matter of their demand on the defendant, and to recover which the action was brought. The submission on which the award was founded, was signed by three of the plaintiffs only, and the only question now is, whether or not that submission be binding on the five, so as to conclude them by the award which has been made under it, or whether or not it might be given in evidence. We think not. It has been said, that a release of a demand, executed by one of five partners, would bind all; that is true, for, if a person owe money to five several partners, he is not bound to pay them altogether, but may pay the debt to any one of them, whose receipt or discharge operates as the receipt or discharge of the whole firm. It has been also said, that an admission by one of several partners is binding on the others. That, however, is not so; for it is not conclusive to bind them, but is only admissible in evidence against them, and, even when allowed, may affect them more or less, as it might have been made in ignorance or by mistake. The principles, however, applicable to a release or an admission, do not appear to be at all applicable to the present case; for, even in the case of a general partnership, one partner has no right to bind the others, but by virtue of an express or implied authority. And here the authority to be implied must be limited to those things which were necessary to carry on the business, in which the plaintiffs were jointly interested or engaged, *viz.* either paying or receiving monies, or drawing or accepting bills, on account of the work in question. It is quite clear,

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that there was no implied authority in the three plaintiffs to enter into the submission to arbitration which they did, so as to bind the others, for it formed no part of the transactions in which they were jointly engaged; and there is no pretence for saying, that there was any delegation of an express authority to that effect; although the point now before the Court was not the question in issue in *Strangford v. Green*, yet it is not to be considered as a mere *obiter dictum*: it was inseparably connected with it; and the principle there laid down appears to govern the present case; and on its being objected, that the other partner was not made a party to the submission, the Court said, that "the defendant might undertake for his partner; and having engaged for him, and promised that he should perform the award on his part (notwithstanding the partner was not bound so to do); yet, if he refused, it was a breach of the defendant's promise." If, therefore, it were a breach of the engagement, on the part of one only, it must be implied that the other was not jointly bound with him; for, had he been, it would have amounted to a breach of the engagement by both, and no proceedings could have been taken against the one alone. The authority referred to, in *Comyns's Digest*, not only confirms that case, but shews that a submission binds the party making it, although he submit for himself and a stranger; and a partner who does not submit, must be considered as a stranger. We have been unable to find any other decision applicable; but we are of opinion, that joint-contractors can only be made jointly responsible for transactions arising in the way of their business or employment; and that one cannot bind the others by a submission to arbitration, made without their knowledge, assent, or authority. We should be very tenacious of extending any further the liability of partners and joint-contractors. The three plaintiffs who signed the articles of agreement in this case, are not injured by it, as they must have been aware that the sub-

mission was imperfect, unless it could have the effect of binding the other two. This rule, therefore, must be

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Discharged.

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MORLEY and two Others *v.* BOOTHBY and CLARKE (*a*). THIS was an action of *assumpsit* on a *guarantie*. The first count of the declaration stated, that on the 26th *May*, 1824, in consideration that the plaintiffs, at the request of the defendants, would sell and deliver to certain persons using the style and firm of *William Clarke, Son, & Co.*, certain goods, wares, and merchandizes, of a certain value, to wit, of the value of 174*l. 13s. 5d.*, to be used in and about building a certain church, to wit, *St. Philip's Church*; at *Sheffield*, in the county of *York*; to be paid for by a bill of exchange, to be drawn by the plaintiffs upon the said *William Clarke, Son, & Co.*, to be payable at a certain day then to come, to wit, at a day not earlier than the 27th day of *November* then next; they (the defendants) undertook, and then and there faithfully promised the plaintiffs, that the said bill should be paid, when due, out of such monies as the defendants should receive before the said bill should become due, for and on account of the building of the said church. The plaintiffs then averred, that they, confiding in the said promise and undertaking of the defendants, did, afterwards, to wit, on the day and year first aforesaid, sell and deliver to the said *William Clarke, Son, & Co.*, divers goods, wares, and merchandizes, of the value aforesaid, to be used in and about the building of the said church; and did, afterwards, to wit;

Saturday,  
May 14th.

The defendants signed, and addressed to the plaintiffs, the following written agreement, viz.—“ We hereby promise that your draft on *W. C., Son, & Co.*, due at Messrs. *Masterman's*, at six months, due on the 27th *Nov.* next, shall then be paid out of money to be received from *St. Philip's Church*, say amount 174*l. 13s. 5d.* :” —Held, that this was not an undertaking to bind the defendants, within the statute of *fradds*, as no consideration for the promise appeared on the face of it.

(*a*) There was another action brought by the same plaintiffs against *Clarke* alone, on his separate undertaking, which was similar in terms to that given by both

the defendants; and the Court observed, that the same argument would apply equally to both, as the pleadings were in effect the same.

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on the 27th *May*, 1824, draw a certain bill, for the said sum of money, on the said *William Clarke, Son, & Co.*, payable to the order of the plaintiffs, at a certain day, not sooner than the 27th *November*, in the year aforesaid, to wit, on the 30th *November*; and the said *William Clarke, Son, & Co.*, then duly accepted the said bill: and although the said bill afterwards, and when the same became due and payable, to wit, on the 30th day of *November*, in the year aforesaid, was duly presented for payment thereof, and although the same was then and there dishonoured by the said *William Clarke, Son, & Co.*, the said acceptors thereof; of which said premises the defendants afterwards, to wit, on the 30th day of *November* aforesaid, had notice; and although the defendants received, before the bill became due, and from thence thitherto had had sufficient monies, for and on account of the building the said church, to satisfy the said bill,— yet the defendants, not regarding their promise and undertaking, but contriving and intending to deceive and defraud the plaintiffs in that respect, had not (although often requested so to do) guaranteed the payment of the said bill, or paid or caused to be paid the said sum therein specified, or any part thereof, to the plaintiffs; but had thitherto wholly neglected and refused, and still neglected and refused so to do. There were other counts, varying the terms of the consideration for the defendants' promise, as well as the time the bill would become due.

The defendants pleaded, that the supposed promise in the first count mentioned, was a special promise to answer for the debt of other persons, to wit, the said persons using the style and firm of *William Clarke, Son, & Co.*; and that no agreement in respect of or relating to the supposed cause of action in that count mentioned, or any memorandum or note thereof, wherein the consideration for the said promise was stated or shewn, was, according to the form of the statute in such case made and provided, in

writing, or signed by the defendants, or by any other person or persons by them thereunto lawfully authorized.

The plaintiffs replied, that a certain agreement in writing, in respect of and relating to the said cause of action in the first count mentioned, wherein the consideration for the said promise was stated or shewn, was made, according to the form of the statute in such case made and provided, in writing, and signed by the defendants; which said agreement was and is to the effect following, that is to say—

“Messrs. *W. Morley & Co.*,

“We hereby promise, that your draft on *William Clarke, Son, & Co.*, due at Messrs. *Masterman's*, at six months, due on the 27th of November next, shall be then paid out of money to be received from *St. Philip's Church*; say amount 17*4l. 13s. 5d.*, say 27th November. We are your's,

“*W. Clarke, W. Boothby.*

“*Sheffield, May 26, 1824.*”

And this the said plaintiffs were ready to verify, wherefore, &c.

To this replication the defendants demurred specially, assigning for causes, that it did not state or set forth any sufficient agreements or agreement in writing, in respect of, or relating to, the supposed cause of action mentioned in the said declaration, which were mentioned and referred to in and by the said replication, and to which the same respectively related. That the supposed agreement in writing, in the said replication, did not state or shew, according to the form of the statute in such case made and provided, any such considerations or consideration for the premises or promise in the said declaration, respectively, stated and alleged to have been the considerations for such promises, and each and every of them respectively. And that the supposed agreement in the said replication mentioned, did not, according to the form of the statute in

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such case made and provided, state or shew any considerations or consideration for the promises mentioned and set forth in the said declaration, or for any or either of those promises. And that such replication was a departure from, and did not support or sustain the declaration; and which said replication related to, and ought to have fortified and sustained such declaration. And also, for that the said replication did not state or set forth the words of the supposed agreement therein mentioned, but only the effect of the agreement therein; whereas, such replication ought to have stated the tenor or words of the supposed agreement.—The plaintiffs joined in demurrer.

The case was argued on a former day in this Term, by

Mr. Serjeant *Onslow*, in support of the demurrer.—The agreement or undertaking signed by the defendants, and set out by the plaintiffs in their replication, is void, no consideration for the promise, as alleged in the declaration, being expressed on the face of it. By the statute of frauds (*a*), it is enacted, that no person can be charged upon any promise to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement*, according to the case of *Wain v. Warters* (*b*), must be understood the consideration for the promise, as well as the promise itself: and therefore it was in that case held, that, where one promised in writing to pay the debt of a third person, without stating on what consideration, *parol* evidence of the consideration was inadmissible, and the agreement *nudum pactum*. And Lord *Ellenborough* there recognized and assented to the definition of the word agreement, given by Lord Chief Baron *Comyns* (*c*), who considered it as being compounded of an *aggregatio men-*

(*a*) 29 Car. 2, c. 3, s. 4.

(*b*) 5 East, 10.

(*c*) See Com. Dig. tit. "Agreement," A. 1.

tium, *viz.* the assent of two or more minds; and that it ought to be so certain and complete, that each party might have an action upon it. The decision in *Wain v. Warliers*, has been fully confirmed by subsequent cases; and Lord Chief Baron *Macdonald*, in delivering the judgment of the Court of *Exchequer*, in the case of *Lyon v. Lamb* (*a*), observed, that "in *Wain v. Warliers*, the distinction was very properly taken between *promise* and *agreement*; and that it was not the promise, but the agreement, or memorandum, or note thereof, which the statute required to be in writing." So, in *Saunders v. Wakefield* (*b*) the defendant pleaded, and the question was raised on demurrer, as in this case; and it was there expressly determined, that an agreement to pay the debt of another, must, in order to give a cause of action, be in writing, and must contain the consideration for the promise, as well as the promise itself, and that parol evidence of the consideration was inadmissible: Lord Chief Justice *Abbott* saying, "I assent to the argument which has been pressed upon us, that the word *agreement*, in the latter part of the fourth section of the statute of frauds, is to be construed to be a word of reference, and that it refers to words contained in the former part of the section. Now, in the former part of the section, we find the words, 'special promise, agreement, contract, or sale.' I read, therefore, the latter part of the clause, as if all those precedent words were incorporated in it, together with the word *agreement*, and then it would stand thus: 'unless the agreement, special promise, contract, or sale, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed, &c.' It is then to be considered, with reference to the common law, whether there can be an agreement, special promise, contract, or sale, which would be valid in law, unless a consideration appeared for

(*a*) Fell on *Mercantile Guaranties*, 260.

(*b*) 4 Barn. & Ald. 595.

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it. Now, at common law, a promise to pay the debt of another, if made simply, and without a good consideration for it, would be void." And Mr. Justice Bayley said, "the object of this statute, which was a most useful act, was to prevent frauds and perjuries; and it ought to be construed so as most effectually to accomplish that object. The 4th section contains several cases, in which it is provided that no action shall be brought. One case is of a special promise by an executor to answer damages out of his own estate; another of a special promise to answer for the debt, default, or mis-carriage of another person. Now, at common law, in order to make a person chargeable in such cases, there must be a special consideration for the promise; either moving to the party promising, or from the party in whose favour the promise is made. Then, the statute provides, that a party shall not maintain an action in such cases, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing; and I think, therefore, that that memorandum must include a statement of the consideration for such agreement." And Mr. Justice Holroyd added, "whether we consider the general object of the statute, or the particular object of the 4th clause, it seems to me to be necessary, that the consideration for the promise should be stated in writing. The consideration is the very ground of the action, and without it the action will not lie." In the late case of *Jenkins v. Reynolds* (a), this Court held, that a letter, addressed by the defendant to the plaintiffs, in which the former said that the latter might consider him as security on account of J. C., to the amount of 100/, was not a sufficient memorandum to bind the defendant, under the statute, the consideration for the promise or undertaking not having been expressed in such letter. And although the case of *Boehm v. Campbell* (b) may be cited as an authority, to

(a) 6 B. Moore, 86.

(b) 3 B. Moore, 15.

shew that the agreement in this case is sufficient to enable the plaintiffs to sustain their action; yet, there the guarantie expressed on the face of it a good and sufficient consideration, moving from the party by whom it was made, *viz.* that *J. S. & Co.* having accepted a bill drawn on them by the plaintiff for a certain sum, the defendant guarantied the due payment of the same, should it be dishonoured by the acceptors. There, too, there was an existing debt due to the plaintiff from *J. S. & Co.*, and he, doubting their solvency, not only drew a bill on them, but also required the defendant to guaranty it, in case it should be dishonoured by the acceptors, *J. S. & Co.* So also, in the cases of *Morris v. Stacey* (a), and *Pace v. Marsh* (b), the consideration was particularly expressed, and the circumstances under which the guarantie was given were set forth: whereas here, it is merely stated in the memorandum, that the plaintiff's draft should be paid out of money to be received from *St. Philip's Church*, which is perfectly unintelligible; and the consideration cannot be explained without resorting to parol testimony, which it was the express object of the statute to exclude. Nor does it appear, on the face of the instrument, by or from whom the money was to be received; nor does it shew any consideration moving from any party. It is a mere promise by the defendants, that they would be liable for the debt of a third person. The memorandum, therefore, as set out in the replication, does not sustain the averments in the declaration, as it does not shew any consideration to support the promise therein alleged.

Mr. Serjeant *Pell*, for the plaintiffs, contended, that the objection raised by the defendants was merely technical, and that the justice of the case was obviously with the former: that although the principle laid down in the case of *Wain v. Warlters*, might, in strictness, be correct, still that its authority had often been questioned. In *Pace v.*

(a) *Holt's N. I. Pri. Cas.* 153.

(b) *8 B. Moore*, 59.

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*Marsh*, Lord Chief Justice *Dallas* said (a), "the defendant, in order to induce the plaintiff to give credit to a third person, to whom he had chartered his vessel, became his surety, and gave the guarantie in question; and he now endeavours to rid himself of his obligation, by making a mere technical objection as to the form of the instrument by which he became bound. Similar objections have, of late, been frequently taken, and have been carried to an extent of very nice refinement; but they are not to be construed beyond the strict exigency of each particular case." Lord *Eldon* has also expressed serious doubts as to the decision of *Wain v. Warlters*, in the cases of *Ex parte Minet*(b), and *Ex parte Gardom*(c): in the former case, he said, "there is a variety of authorities directly contradicting the case in the Court of *King's Bench*, which is a most important case with reference to the consequences, for the undertaking of one man for the debt of another does not require a consideration moving between them:" and in the latter, he observed, that "until the case of *Wain v. Warlters* was cited in *Ex parte Minet*, he had always taken the law to be clear, that if a man agreed, in writing, to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing." Although the authority of *Wain v. Warlters* has since been recognized in *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, it is singular that the construction put, by all the Courts, upon this statute, has not been uniform. At all events, a sufficient consideration is here stated by the plaintiffs, in their declaration, which is fully supported by the instrument set out in the replication. The contract or agreement declared on, and that set out, are in strict accordance with each other; and the intent for which it was given is sufficiently clear, without recourse being had to parol evidence, to shew in what manner, and

(a) 8 B. Moore, 61.      (b) 14 Ves. 189.      (c) 15 Ves. 286.

out of what particular fund, the money was to be paid. The consideration for the promise of the defendants was sufficiently identified with the building of *St. Philip's Church*, to shew the situation in which the parties stood towards each other; as also to shew that the plaintiff's draft on *Clarke & Co.* was to be paid out of the money to be received therefrom. The case of *Boehm v. Campbell* is infinitely stronger than, though scarcely distinguishable from, the present. There, the defendant entered into an agreement, stating that *J. S.* having accepted a bill drawn on him by the plaintiff, he thereby guarantied its due payment, in case it should be dishonoured by the acceptor; and it was held to be a sufficient agreement within the meaning of the statute. That case, supported as it is by *Pace v. Marsh*, is, at all events, conclusive to shew, that a very slight apparent consideration for a promise by one person to pay the debt of another, is sufficient to satisfy the words of the statute.

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Mr. Serjeant *Onslow*, in reply.—The chief object of the statute, which was passed for the express purpose of preventing frauds and perjuries, in providing for cases of this description, was, that a written instrument, creating a liability not previously existing, *viz.* to pay the debt of a third person, should not, if defective, or in itself unintelligible, be explained or rendered efficient, by parol testimony; but that a consideration, moving from the party making it, must, to make him liable to an action upon it, appear on the face of it. This was the leading principle established by the cases of *Wain v. Warlers*, and *Lyon v. Lamb*. *Morris v. Stacey* differs widely; for there the defendant was the original debtor, and the bills and guarantie were given at the same time. The case of *Boehm v. Campbell*, which was prior to those of *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, merely came before the Court on a motion for a new trial; and the consideration there was apparent,—a debt being due to the plaintiff from the persons for whom

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the defendant became guaranteee, the plaintiff, doubting their solvency, drew a bill on them, which they accepted, and took the defendant's undertaking for its payment, if dishonoured by them. So, also, in *Pace v. Marsh*, the consideration appeared on the face of the instrument, and the circumstances under which it was given were specifically set forth. Here, however, the meaning of the agreement, respecting the payment of the plaintiffs' draft out of money to be received from *St. Philip's Church*, is extremely doubtful, if not altogether unintelligible; and it is absolutely impossible, looking at its language, to conjecture for what consideration the draft was given, or out of what funds it was to be paid. Although a sufficient consideration is alleged in the declaration, yet, as the memorandum, as set out in terms in the replication, contains none, the omission cannot be supplied by parol testimony; and, therefore, the defendants' plea is a good defence to the action, and is not answered by the replication:

*Cur. adv. vult.*

Lord Chief Justice BEST (after stating the pleadings, and observing, that, although the declaration alleged a sufficient consideration for the promise by the defendants, yet, that the agreement, as set out in the replication, did not support such allegation), proceeded to deliver the judgment of the Court, as follows:—By the common law, persons were protected against improvident contracts; but if they bound themselves by deed, it was considered that they must have deliberated upon what they were about to do, before they entered into so solemn an engagement. It, therefore, was not deemed necessary to the validity of a deed or contract under seal, that a consideration should appear on the face of it; though, in all other cases, the contract was invalid, unless the party making the promise were to derive some advantage, or the party to whom it was made were to suffer some detriment or inconvenience therefrom. If the contract were verbal, such advantage

or inconvenience could only be proved by parol evidence. When, however, the contract was reduced into writing, it was not only required that the obligatory part, but also that the consideration or inducement for the promise, should be in writing; it being a rule of evidence, that parol testimony cannot be admitted to explain the contents, or supply the defects of a written instrument. If, therefore, the writing itself did not shew the consideration, it could not be proved by other means; and, consequently, in such a case, the contract failed;—the consideration, without which it was altogether inoperative, not being shewn. By the 4th section of the statute of frauds, it is enacted, “that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.” And we are of opinion, that, according to that statute, the whole agreement must be stated in writing, the established rule of evidence uniformly requiring, that parol testimony cannot be admitted to shew that a contract is different from that reduced into writing. Applying, therefore, the principles of the common law to the terms of the statute, I repeat what I said in the case of *Saunders v. Wakefield*(a), *viz.* that, independently of the case of *Wain v. Warlters*, the consideration must appear on the face of the writing: The express object of the statute was, the prevention of frauds and perjuries; and, in order to attain that object, the shewing the consideration for the promise in an instrument of this kind, has always been considered indispensable. The whole transaction must be reduced to writing, for there would be the same danger of perjury, in proving, by parol evidence,

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the consideration as the promise. It is not necessary, according to the cases of *Wain v. Warlters*, *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, that the consideration should be expressed in words of form, but it is sufficient if it appear clearly, and free from doubt or ambiguity. In *Ex parte Minet*, Lord *Eldon* is said to have expressed himself dissatisfied with the decision of *Wain v. Warlters*; but I think his Lordship must have been misapprehended by the reporter, who has made him say, "the undertaking of one man for the debt of another, does not require a consideration moving *between them*." No Court of law has ever decided, that there must be a consideration moving directly between the person giving, and the person receiving the guarantie: it is enough, if the person, for whom the guarantie is given, thereby receive a benefit or advantage; or if the party, to whom it is given, suffer a detriment or inconvenience, to form an inducement to the surety to render himself liable for the debt of the principal.—Lord *Eldon*, again, in *Ex parte Gardom*, expressed his dissent from the case of *Wain v. Warlters*; but his judgment in that case is not opposed to the doctrine there laid down, as his Lordship was of opinion, that there was a sufficient consideration apparent on the face of the guarantie. It must, however, be observed, that the cases of *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, were decided, the former in the *King's Bench*, and the latter in this Court, subsequently to those of *Ex parte Minet* and *Ex parte Gardom*. In *Boehm v. Campbell*, and *Pace v. Marsh*, this Court did not affect to overturn, or infringe on, former decisions, but came to the conclusion they did, from a conviction that the consideration was sufficiently expressed on the face of the instruments on which the respective actions were founded. In both those cases the guaranties expressed a by-gone consideration; and it is not material now to inquire whether or not such were a sufficient consideration, as, in the present case, the instrument set out by the

plaintiffs in their replication contains neither an executed nor an executory consideration. It does not appear that the credit, which had been previously given to the original debtors, was extended in consequence of the garantie. When the draft which had been given became due, the debtors were liable to be sued as well after as before the giving of the garantie. No benefit or advantage accrued to them from that instrument, nor did the plaintiffs suffer any detriment or inconvenience, in consequence of the execution of it: and although it speaks of money to be received from *St. Philip's Church*; still, it does not appear that the defendants had any particular interest in, or were to be in any degree affected by, such money. We are, therefore, of opinion that the garantie, as set forth in the replication, does not support the averments in the declaration, and that, consequently, there must be

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#### Judgment for the defendants.

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#### DUNNE v. ANDERSON.

*Saturday,  
May 14th.*

**T**HIS was an action for a libel. The first count of the declaration stated, that the plaintiff, long before, and at the time of publishing, &c., was, and still is, a surgeon, and the profession of a surgeon used, exercised, and carried on, to wit, at, &c.; and in the course and exercise of such his profession, had always conducted himself with great skill, knowledge, fairness, regularity, and ability; and had not only never been guilty of quackery, empiricism, puffing and humbugging, or other dishonourable, unlaw-

The plaintiff, a surgeon, and proprietor of a medical institution, having petitioned the House of Commons against quacks and empirics, the defendant, the proprietor of a periodical publication, in commenting upon, and criticising,

the plaintiff's petition, used expressions charging him with ignorance of his profession generally, and of chemistry in particular. The plaintiff sued the defendant, and declared against him for libelling him in his profession of a surgeon; and the Jury were directed, that, if they thought the writing complained of, to be no more than a fair comment on the petition, it was no libel; and that they were to consider whether the publication imputed to the plaintiff ignorance in his profession of a surgeon, or merely ignorance of chemistry; and that, if they thought the latter, their verdict must be for the defendant.—The Jury having accordingly found a verdict for him, the Court granted a new trial.

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ful, or disgraceful practices; but, until the time of publishing, &c., was never suspected of having been guilty of such practices, or any of them; and by means of the premises, was daily acquiring great gains and profits in the way of his said profession, to the comfortable support of himself and his family, and the great increase of his riches, and had acquired and enjoyed the friendship, good opinion, regard, and esteem of all his neighbours, patients, and other good and worthy subjects of this realm, to wit, at, &c. That, before and at the time of committing the grievances by the defendant, the plaintiff was a member of the *Royal College of Surgeons* in *London*, and had established, set up, and carried on, and still did carry on, in *Regent Street, Westminster*, a certain establishment, called the *Athenée or Royal Institute*, a branch of the *Athenæum*, from the carrying on of which he was daily deriving sundry great gains and profits. That before the time of committing the grievances, the plaintiff had presented to the Honourable the Commons of the United Kingdom of *Great Britain* and *Ireland*, in Parliament assembled, a petition, for, among other things, certain purposes, to wit, for its parliamentary sanction and legislative authority against the practice of empiricism in *England*; for supporting the just privilege of real professional merit; for enforcing the honest discharge of their duty by medical persons towards the public; and to associate the profession to give gratuitous advice in the different districts or counties, by branches, on the same plan as pursued in the National Vaccine Establishment:—yet, that the defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending, wilfully and maliciously, to injure the plaintiff, not only in his said profession of a surgeon, but in his general character; to destroy his good name, fame, credit, and reputation; to bring him into great public scandal, infamy, and disgrace with and amongst all his neighbours, patients, and other good and worthy sub-

jects of this realm; and to cause it to be suspected and believed by those neighbours, patients, and subjects, that the plaintiff was a quack and empiric, and had been and was guilty of the offences and misconduct thereafter mentioned; and to vex, harass, and oppress him, theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously, did publish, and cause and procure to be published, of and concerning the plaintiff, and of and concerning him as a surgeon as aforesaid, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, libellous, and defamatory matter following, of and concerning the plaintiff, and of and concerning him as a surgeon, as aforesaid, that is to say, "Humbug petition to Parliament (meaning the said petition of the plaintiff). A Mr. Dunne, of *Regent Street* (meaning the plaintiff), has taken up the idea started by us, and petitioned Parliament to abolish quackery, and the sale of patent medicines. Had this been a genuine and straight forward thing, we should have been the first to hail it as a symptom of reform in the grossest of our national grievances. Had it been, in short, a petition from the people, who suffer in purse and person by the legal robberies of quacks, legitimate and illegitimate, it would have been all very well; but coming thus, in the shape of a humbug puff, (meaning that the plaintiff's petition was a humbug puff), from an unknown and an ignorant man (meaning the plaintiff), who has set up a Royal Medical Institute (meaning the said *Athenée or Royal Institute*, set up in *Regent Street* aforesaid), in rivalry of *Jordan's Medical Establishment*, or *Nisbet's Army Board*, or *Eady's Soho Concern*, or *Kiernan's humbug in Leicester Square*, (meaning certain quack and empirical establishments, before then established, set up, and carried on, by divers persons, and meaning that the said establishment of the plaintiff was an establishment of the same description as the various quack and empirical establishments

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aforesaid), we must pause. This petition, (meaning the said petition of the plaintiff), indeed, is the most bare-faced puff we recollect to have ever seen, and by a person, (meaning the plaintiff), who, though he may have passed muster at the college, (meaning the *Royal College of Surgeons* in *London*), after paying his guineas, is profoundly ignorant of the science of his profession, (meaning the said profession of a surgeon, which he, the plaintiff, so used, exercised, and carried on as aforesaid), and would be put to the blush by any one of the quacks whom he evidently wishes to rival. We should not hesitate to match against his, (meaning the plaintiff's,) chemical knowledge, either *Eady, M'Donald* (meaning certain quacks and empirics), or the quack letter-puffer of the *French Tonic Wine* (meaning a certain quack medicine, called or known by the name of the *French Tonic Wine*); and yet this Mr. *Dunne*, (meaning the plaintiff), a member, as he tells us, of the *Royal College of Surgeons*, has the assurance to come before the House with a petition, praying the abolition of all quack medicines, until they shall have been analysed. As for his college membership, we hold that cheap; as *Taylor & Son, Eaton, Goss & Co.*, and many others equally notorious, can claim, we understand, the same distinction. But you must hear the humbug petitioner (meaning the plaintiff), himself, to understand the very deep knowledge which is possessed by a member of the *Royal College of Surgeons*:—‘ On the continent, no medicines (similar to those with us called patent), are permitted to be sold, without first having been analysed by the constituted chemical authorities, and duly examined by the respective faculties of medicine. If this plan were adopted in *Britain*, your petitioner humbly submits, many valuable lives would be saved annually, and not one-twentieth of the miserable objects would be found in our streets, or in our hospitals, as at present; and this might be effected without lessening materially the revenue produced by such

poisonous means; for the reporters would naturally limit the use of such medicines to those diseases only in which they would be useful; and they would also prevent any improper article being introduced into the composition. After this display of chemical ignorance by the college member, (meaning the plaintiff), we would scarcely add a word: it is only matched by the grammatical blunders which abound in this parliamentary puff, (meaning the said petition of the plaintiff), as we may call it, of his *Royal Medical Institute*. Pray, may we ask this analyser of quack medicines, (meaning the plaintiff), what test he has discovered for hemlock, *digitalis*, helebore, aconite, night-shade? and, not to go into the dark regions of vegetable chemistry, we may ask him what analysis he can make of *James's Powder*? We advise him, (meaning the plaintiff), to try to get an engagement in the Tonic Wine Establishment, (meaning a certain quack or empirical establishment for the sale of a certain quack medicine, called, or known by the name of Tonic Wine); to write puff letters for the concern, (meaning the said last mentioned quack or empirical establishment), as it seems to be much more in his (meaning the plaintiff's,) line, than chetrical analysis, of which, according to his own evidence, he knows nothing."

The second count was similar to the first, omitting some of the innuendoes; and the third count set out that part of the libel only, which attributed ignorance to the plaintiff in the science of his profession of a surgeon. The defendant pleaded not guilty.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the last Sittings in this Term, the plaintiff proved that the defendant was a bookseller, residing in *Smithfield*, and the proprietor of a periodical work, called the "*Cottage Physician and Family Adviser*," in which the libel in question was inserted:—And that the defendant persisted in selling it, notwithstanding the plaintiff frequent-

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ly remonstrated with him on the subject; and he also refused, although requested, to disclose the name of the author of the libel. It was also proved, that the plaintiff was a member of the *Royal College of Surgeons*, by the production of his diploma; that he was the proprietor of an establishment in *Regent Street, Westminster*, called the *Athenée*, where lectures on medicine had been occasionally given; and that he had practised medicine; but it did not appear that he was then, or had lately practised as a surgeon.

The plaintiff's petition to the *House of Commons*, which had been presented and read there, was then produced, and which was as follows:—

“ To the Honourable, the Commons of the United Kingdom of *Great Britain* and *Ireland*, in Parliament assembled—

“ The humble petition of *Charles Dunne*, member of the *Royal College of Surgeons*, in *London*, subscribed by other members of the same College.

“ Sheweth:—That the present charter, whereby the functions and privileges of the members of the *Royal College of Surgeons* in *London*, are regulated, so far from protecting regularly bred practitioners, often subjects them to injury and insult, by the tolerance of ignorant, disqualifed, and unworthy persons, to practise the art and science of surgery, in the very heart of our metropolis: the College, though a chartered body, not being authorized to prevent any person whatever from practising surgery, although it possesses sufficient power to punish its own members for any breach of its bye-laws.

“ That, for the better protection of the public and the community at large, against the immorality and the horrors daily committed by quack-doctors, and to secure the medical profession in general in its rights and immunities, as well individually as collectively, it is become necessary, from the extraordinary inundation of audacious empirics,

who, of late years, have so shamefully assumed the professional character, that an application be made to Parliament, for arresting the progress of so much moral turpitude, in a country whose laws are supposed to flow spontaneously to meet anticipated wrong.

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" That, with a view to remedy, as much as possible, the baneful effects of medical quackery, practised by the very dregs of the people, it is, amongst other things, intended, that stations, after the plan of the *National Vaccine Establishment*, shall be formed in various districts, throughout the kingdom, where three members, at least, of the *Royal Colleges of Physicians and Surgeons in London*, shall attend every morning to give advice, without remuneration, to the indigent of both sexes; and that the institution, for these and other reasons, equally cogent and irresistible, shall be intitled 'The *Royal Medical Institute*.' That one of the principal objects of this society be, to preserve the dignity and just privileges of the respective classes of the physician, the surgeon, and the apothecary, and to support the credit of those persons who honorably demean themselves in their respective branches; to promote useful and scientific communications, and fair and honorable practice; to prevent abuses in the profession, to punish pretenders to it, and to adopt such other measures as may be best calculated to ensure respectability to its members, and advantage to the community.

" That during ten years' extensive practice on the continent of *Europe*, your petitioner never heard of any quack-doctor being tolerated for an instant; on the contrary, if it were found that even any member of the profession acted in any way derogatory to his professional character, he would be immediately handed over to justice, to be dealt with according to a specific law, in the *Code Napoleon*, for the punishment of medical men, and impostors pretending to medical knowledge. Your petitioner further humbly begs leave to observe, that, however speculation may be

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allowed to extend and ramify itself in other concerns of life, it should never be permitted, in a well regulated government, in what regards the health and lives of our fellow creatures. Your petitioner has every reason to believe that, at the most moderate calculation, several thousands of lives are annually sacrificed, through the ignorance and improper treatment of quack-doctors, not to say anything of the numerous miserable objects of disease in our streets and in our hospitals, the effects of their deadly nostrums.

" That the malpractices of quack-doctors are wisely guarded against in every country of *Europe*, except *Britain*; for no person, under pain of fine and imprisonment, is allowed to take charge of the sick, or even to direct the application of medicines, without having gone through the proper ordeals of examination as to his professional knowledge and acquirements. In *England*, it is notorious, that we have not only carpenters, tailors, bricklayers' labourers, lead-pencil makers, Jews, old clothes-men, journeymen linen-drapers, and men of colour, but even women quacks, who practise their duplicities on the unwary and unthinking part of the public, by plundering all those who have the folly to approach them, whilst many are absolutely deprived of life by them; and others, who have the misfortune to escape death, are left to drag on a miserable existence with an entirely broken constitution, for the remainder of their days. The baneful effects, too, of patent medicines, as they are called, deserve particular notice, the composition of which is formed in such a manner, as to render their administration at all times dangerous, and but too often fraught with death. Whereas, on the continent, no medicines, similar to those with us called patent, are permitted to be sold, without first having been analysed by the constituted medical authorities, and duly examined by the respective faculties of medicine.

" That if this plan were adopted in *Britain*, your petitioner humbly submits many valuable lives would be saved

annually, and not one twentieth of the miserable objects would be found in our streets, or in our hospitals, as at present; and this might be effected without lessening materially the revenue produced by such poisonous means: for the reporters would naturally limit the use of such medicines to those diseases only in which they would be useful, and they would also prevent any improper article being introduced into their composition. Your petitioner, however, whilst he acknowledges that there are efficacious remedies for some few diseases, the mode of whose operation by which they cure is unknown, and such remedies are called specifics, as arsenic and cinchona in intermittents, mercury in \* \* \*, and sulphur in psora, denies that quack medicines, not composed of these ingredients and applied in those diseases just mentioned, have any specific effects; and even if they had, he humbly submits, nevertheless, that it would not only be repugnant to reason, but prejudicial to society, to give a latitude to the unlearned, ignorant, unworthy, and unprincipled quack, to do mischief by those pretended specifics for different maladies, which have no foundation in fact: and whilst it shews the freedom of our laws in this respect, it affords an opportunity to these impostors, to commit every species of fraud and depredation on the public, particularly to the ruin both of the pocket and constitution of the lower classes, always eager to flock for relief to those daring empirics, whose trade it is to hold out extraordinary promises to their dupes, of their cures, which they know themselves totally unable to perform.

"Your petitioner, therefore, most humbly prays, that this Honourable House may, in its wisdom, rescue the *English* nation from the obloquy thrown upon it by foreigners of all nations, of being a nursery for those vipers, denominated quack-doctors, by making a law, rendering it a misdemeanor for any person, (for the sake of gain or reward), to prescribe for the sick, without the necessary qua-

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lification of a diploma, and enable the present Institute to prosecute to conviction disqualified persons so prescribing, or to adopt such other measures as may tend to eradicate this great evil, as, in the superior judgment of this Honourable House, may seem meet.

“ And your petitioner, as in duty bound, will ever pray.

“ *Charles Dunne.*

“ 164, Regent Street, 10th May, 1824.”

This petition was subscribed by four other persons, who styled themselves surgeons.

No evidence was produced by the defendant; but it was contended, that, as the plaintiff had intruded himself upon the public by setting up the *Athenés*, and by his petition to Parliament, the defendant had a right to comment on the contents of such petition.

His Lordship, who was strongly inclined to think that the defendant's publication was a fair comment, told the Jury, that if its tendency were to convey a reflection on the plaintiff in his private practice, or to impute to him ignorance in his character of a surgeon, it would be a libel; but that, if it only imputed to him ignorance in the science of chemistry, it might not interfere with his general reputation as a surgeon; and as the declaration merely charged the defendant with libelling the plaintiff, and imputing to him ignorance in his profession of a surgeon, the action could not be maintained; and that if the publication complained of were a libel, it was greatly aggravated by the defendant's conduct at the time of the plaintiff's remonstrance. His Lordship also observed, that a defendant could not justify bringing the character of a private individual before the public; nor could any one be warranted in attacking another for ignorance in his profession, unless he could shew the truth of what he advanced. That the question for their consideration was, whether the defend-

ant had imputed to the plaintiff ignorance, beyond that which could be fairly collected from the contents of his petition. That if the defendant had come forward to impute ignorance to the plaintiff in his profession of a surgeon, without any ostensible reason for so doing, the plaintiff would be entitled to damages, particularly as the defendant refused to discontinue the publication, or to give up, when requested, the name of the author of the alleged libel; but that if, professing to instruct and reform the world, the plaintiff clearly demonstrated an utter incompetency for the task he had thought proper to impose on himself, the defendant had committed no offence in warning the public against the incapacity and ignorance of such a self-constituted mentor; for, that, where a man obtruded himself upon the public by proposing measures affecting the interests of the community at large, his speculations were proper and legitimate objects of observation and temperate criticism.

The Jury found a verdict for the defendant.

Mr. Serjeant *Vaughan*, having, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside and a new trial granted, on the grounds that the libel clearly imputed to the plaintiff ignorance in his profession of a surgeon; and that his Lordship had misapprehended its tendency at the trial;—that the petition to the *House of Commons*, having been carried up and entered on the journals of that House, was in the nature of a privileged communication, and could not be deemed such a publication or obtrusion of the petitioner on the notice of the public, as to justify any comment or criticism being made on any statement therein contained;—that the plaintiff never professed to have any knowledge of chemistry, but came before the public in his character of a surgeon;—and that it was evident, that, even supposing the defendant to have derived his knowledge of the plaintiff's character and

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acquirements from the petition alone, the publication of the libel was malicious, as the fact of ignorance was nowhere to be collected from the language of the petition, or from any thing that appeared on the face of it;—and that, at all events, the publication sanctioned by the defendant could not be deemed a fair comment; as, if it had been, the defendant would not have refused to give up the author when required so to do;—and he has not attempted to put any plea of justification on the record;—and, taking the petition and terms of the paper containing the libel together, there can be no doubt but that the latter had reference to the plaintiff, in his character of a surgeon, and imputed to him, as such, gross ignorance and want of skill.

Mr. Serjeant *Spankie* now shewed cause.—This case was fully, fairly, and satisfactorily left to the Jury, and the question to be decided fell exclusively within their province. The construction to be put on a libel, and the ascertaining the motive with which it is published, form a mixed question of law and fact, which a Jury is fully competent to decide. Supposing, even, that the publication in question did impute ignorance to the plaintiff in his profession of a surgeon; yet, if it were done without malice, and were no more than a fair critique on the plaintiff's own production, and without any intent to defame, there can be no reason why the defendant should be put to the inconvenience and expense of a new trial; and more particularly, as a Jury have already found the alleged libel to be a fair comment on the plaintiff's petition, and have altogether negatived the fact of malice. In *The King v. Woodfall*(a), Lord *Mansfield*, in effect, held, that the meaning of a libel was a matter of fact, which the Jury were competent to decide, as he said to them, “if you believe the evidence as to the publication, and the intent of the paper as

(a) *Loft*, 781.

stated in the information, you will find the defendant guilty, otherwise you will acquit him." And here, the intention of the writer must be collected from all the facts connected with the libel; and, if so, it is quite clear that, taking the whole of the libel together, it only tended to impute to the plaintiff an ignorance of *chemistry*; and although it stated that he was profoundly ignorant of the science of his profession, and would be put to the blush by any of the quacks whom he undoubtedly wished to rival, yet it was meant to refer to his ignorance of *chemistry* only, as is proved by the next sentence, *viz.* "we should not hesitate to match against his *chemical* knowledge either *Eady, M'Donald*, or the quack letter puffer of the *French Tonic Wine*;" and then, after setting out part of the plaintiff's petition as to analysing medicines, the writer proceeds thus, "after this display of *chemical* ignorance by the college member, we would scarcely add a word;" and concludes by advising him to write puff letters for the Tonic Wine Establishment, as it seemed to be much more in his line than *chemical* analysis, of which, according to his own evidence, he knew nothing. Although, in *Fairman v. Ives*(a), a petition, addressed by a creditor of an officer in the army to the Secretary at War, *bond fide*, and with a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts which, although derogatory to the officer's character, the creditor believed to be true, was held not to be a malicious libel for which an action was maintainable, on the ground that it was in the nature of a privileged communication; yet, as the petition in question related to matters affecting the public at large, it was undoubtedly a publication inviting criticism, and open to free discussion. And Mr. Justice *Holroyd* drew the true distinction in that case, *viz.* "by shewing the truth of the slanderous matter which is the

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(a) 5 Barn. & Ald. 642.

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subject matter of the action, you do not shew that it was not maliciously spoken or published, but merely that the party is not entitled to damages, because he is guilty of the charge imputed. On the other hand, by shewing that the slander was spoken or published on a justifiable occasion, you shew that it was not done maliciously; and that goes to the very gist of the action."

In *Carr v. Hood* (*a*), it was held not to be libellous to ridicule a literary composition, or the author of it, in as far as he has embodied himself with his work; and that if he be not followed into domestic life, for the purposes of personal slander, he cannot maintain an action for any damage he may suffer, in consequence of being thus rendered ridiculous. And in *Tabart v. Tipper*, Lord *Ellenborough* said (*b*), "liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." His Lordship, therefore, held it to be lawful for an author to animadvert on the conduct of a bookseller, accusing him of being in the habit of publishing immoral and foolish books; and that the defendant, in an action of libel on the plaintiff in his business as such bookseller, might, under the general issue, adduce evidence to shew that the supposed libel was a fair stricture on the general run of the plaintiff's publications: and if so, how much more does the framer of a petition to Parliament lay himself open as a fair object of criticism and comment. Here, the plaintiff, by his petition, travelled far beyond the limits of his pro-

(*a*) 1 Campb. 354, n.

(*b*) Id. 350.

fessional character as a surgeon, and by exposing his ignorance and weakness of intellect, shewed his utter incompetency to the task he had attempted to undertake. Such pretenders are the most dangerous enemies of improvement; and it is, therefore, not only justifiable, but is the public duty of every reviewer, to expose and hold them up to censure. When this petition was presented to the *House of Commons*, as the representatives of the people, it was no longer a privileged communication, and consequently the public had an undoubted right to exercise its critical judgment on its merits; and more particularly, as it related to an affair of such vast magnitude and importance to society, as to point out a remedy for all maladies and diseases, to which the human race might be subject: and it cannot be contended for a moment, that the defendant was actuated by any malicious motives; but it must be admitted that what was published by him was merely a comment, and that a fair one, on the ridiculous petition then before him. It is evident, according to the case of *Carr v. Hood*, that the defendant was justified in reviewing and observing on the plaintiff's production, as he did not attack him in his private character or professional practice, but merely as an author, he having, as such, rendered himself amenable to the laws of just, fair, and honorable criticism; for, in *Carr v. Hood*, Lord *Ellenborough* said (a), "one writer, in exposing the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation, or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuriâ*. Where is the liberty of the press, if an action can be maintained on such principles? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise, the first who writes a book on any sub-

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ject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Shew me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any Judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule." "Every man," continued his Lordship, "who publishes a book, commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator do not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. Whatever may be the merits of the works of authors, others have a right to pass their judgment upon them; to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. We ought to resist an attempt against free and liberal criticism at the threshold." His Lordship then concluded by directing the Jury, that if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but that if they could discover in it any thing personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly:—they found a verdict for the defendant. In *The King v. Creevey (a)*, Mr. Justice *Le Blanc* stated, that, at the trial of that cause, he told the Jury, that they were to consider, whether the publication, in a newspaper, by a Member of Parliament, of the report of a speech delivered by him in the *House of Commons*,

tended to defame the prosecutor; that where the publication is defamatory, the law infers malice, unless any thing can be drawn from the circumstances attending the publication, to rebut that inference; and he left it for them to say, whether the circumstances of that particular case did rebut that inference. And in *The King v. Woodfall*, Lord *Mansfield* said (a), "I directed the Jury, (at the trial), to consider whether all the innuendoes, and all the applications to matter and persons made by the information, were, in their judgment, the true meaning of the paper. If they thought otherwise, they should acquit the defendant; but if they agreed with the information, and believed the evidence as to the publication, they should find him guilty." So, here, the Jury alone were to judge of the motives or intention of the author of the libel, as to whether he had intended to cast an imputation on the plaintiff's professional character of a surgeon, or merely to comment on his want of chemical and grammatical knowledge. The Jury exercised a sound and proper discretion, and found, in effect, that the publication complained of applied exclusively to the latter. Nothing appears in the alleged libel calculated to raise the slightest presumption of malice; and even if the Court should feel disposed to grant the present application, it is most probable that the plaintiff, if a second Jury gave him a verdict, would only recover very trifling damages; and, therefore, this case falls within that of *Marsh v. Bower* (b), where a verdict, in an action for slander, was given for the defendants, clearly against evidence, yet, as it appeared, that, if the verdict had been given rightly, the damages must have been very trifling, the Court refused to grant a new trial, unanimously declaring that they would not do so for the sake of *sixpence* damages, in mercy to the plaintiff as well as the defendant.

(a) 5 Burr. 2666.

(b) 2 Sir W. Bl. 851.

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Mr. Serjeant *Vaughan*, in support of the rule.—If the present application be not granted, all the principles of law, with regard to libel, will be shaken or impugned, as this publication clearly imputed to the plaintiff ignorance in his character of a surgeon. The amount of damages that he might recover, if the cause go down again, are entirely out of the question, as the Jury had arrived at a conclusion, contrary both to law and fact. Besides, the question for their determination was not left to them in so clear and correct a manner as it might have been. Although it be justifiable for one writer fairly and candidly to criticise the work of another; yet, here, the petition of the plaintiff was not such a work as to become a legitimate subject of comment. It was in the nature of a privileged communication, and, therefore, bears no analogy whatever to a general authorship; or, if the libel had been confined to the want of *chemical* knowledge (which the plaintiff did not profess), it would be a different question; but it is quite clear, that its only object was to traduce his professional character generally. Every subject has an undoubted right to petition Parliament; insomuch so, that it was held, in the case of *Lake v. King* (a), that the printing of a false and scandalous petition to a committee of the *House of Commons*, and delivering copies thereof to the members of the committee, is justifiable, because it is in the order and course of proceedings in Parliament, of which the King's Courts will take judicial notice. This case is materially distinguishable from that of *Carr v. Hood*, as there, the plaintiff, from the ridiculous nature of his publication, laid himself open to exposure; and fair criticism was the defendant's only object. It is too much, however, to say, that, if a man publish a work, he thereby invites criticism to such an extent as to subject him to exposure, ridicule, scorn, and contempt: if, indeed, it were

so, no character would be safe from aspersion. In short, as, here, the defendant's publication clearly manifested malice towards the plaintiff, and imputed to him gross ignorance in his profession of a surgeon, he was clearly entitled to a verdict.

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The Court, without expressing any decided opinion on the merits of the case, observed, that, under all circumstances, the best course to be adopted, was to send it down to be re-tried, (the costs of the first to abide the event of the second trial), and intimated, as a reason for so doing, that, the plaintiff having brought a similar action against the printer of the libel in question, it might tend to the prejudice of one of the parties, if the Court expressed a final opinion on this occasion.

Rule absolute for a new trial (*a*).

(*a*) Upon the second trial, the plaintiff recovered *one farthing* damages. See 1 Ryan. & Moody, N. P. C. 289.

THOMAS v. JACKSON.

*Saturday,  
May 14th.*

**T**HIS was an action for slander. The first count of the declaration stated, that the plaintiff was a husbandman, and farmer of a certain large farm of arable and other lands, with the appurtenances, and a vendor of corn raised and grown by him in and upon his said farm and lands; that he carried on the business of a husbandman and vendor of corn with great honesty and integrity, and had thereby not only acquired great gain, profit, and emolument, but had thereby also deservedly gained the good opinion and credit of his neighbours, and other good and

The plaintiff declared that he was a farmer and vendor of corn, and that the defendant said of him, as such,—“ You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats, worse by six-pence a bushel than I bargained for.” —Held actionable, without

proof of special damage, as such words imputed to the plaintiff fraud in his business as a seller of corn.

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worthy subjects to whom he was in any-wise known, and had never been guilty of fraudulent or roguish practices; yet, that the defendant, intending to injure him in his good name, fame, and credit, and to bring him into public infamy and disgrace, said to and of the plaintiff, as such husbandman, farmer, and vendor of corn, in the presence and hearing of divers other persons, to whom the plaintiff was known, the false, scandalous, and defamatory words following:—" You are a rogue and a swindling rascal; you delivered me a hundred bushels of oats, worse, by six-pence a bushel, than I bargained for." The plaintiff then alleged, by way of special damage, that one *John Marr*, who, before the speaking of the words, was about to purchase a certain quantity of barley of the plaintiff, thereupon refused to do so.

There were several other counts, one of which charged the defendant with having said of the plaintiff, that he was a rogue and a swindling rascal, thereby intending to injure him in his character of a farmer and vendor of corn.

The defendant pleaded the general issue, and a plea of justification, alleging that the plaintiff sold him oats, six-pence a bushel worse than those bargained for.

At the trial, before Mr. Justice *Bayley*, at the last Assizes at *York*, the plaintiff proved the speaking of the words by the defendant, as laid in the declaration, but failed to establish the special damage, not being prepared to shew that *Marr* was, as alleged, about to purchase barley or any other corn of him. The learned Judge told the Jury, that, in the absence of proof of special damage, the action could not be maintained; and that, consequently, their verdict must be for the defendant.

The Jury accordingly gave a verdict for him, leave being reserved to the plaintiff to move that it might be set aside, if the Court should be of opinion, that the words

spoken were actionable in themselves, so as to entitle the plaintiff to recover, without proving special damage.

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THOMAS  
v.  
JACKSON.

Mr. Serjeant *Bosanquet* having, on a former day in this Term, obtained a rule, calling on the defendant to shew cause why this verdict should not be set aside, and a verdict entered for the plaintiff, or a new trial granted, on the ground that the words were spoken of the plaintiff, with reference to his business or calling of a farmer or vendor of corn; and as it was proved that they were spoken by the defendant as alleged in the declaration, they were of themselves actionable; and the plaintiff was, consequently, entitled to a verdict, notwithstanding his having been unable to establish any special damage:—

Mr. Serjeant *Vaughan* now shewed cause, and submitted that the direction of the learned Judge, who tried the cause, was perfectly correct; and that, the Jury having found that the principal allegation contained in the plaintiff's declaration had not been substantiated, he having failed to prove any special damage, the verdict was conclusive, and ought not to be disturbed.

Lord Chief Justice *BEST*.—I am clearly of opinion, that, as the plaintiff has alleged that the words in question were spoken of him in his business as a farmer and vendor of corn, they were of themselves actionable, without proof of special damage. This case may be assimilated to that of an action against a person for imputing negligence and want of skill, or mal-practice, to a surgeon, an attorney, or any other person exercising a profession, trade, or business, by which he gains his living, and which might unquestionably be maintained. The principal allegations contained in the declaration, were, in point of fact, substantiated, the words as laid having been proved to have been spoken by the defendant. The rule for a new trial must be made.

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*v.*  
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absolute, unless the defendant, within a week, consent to allow a verdict to be entered for the plaintiff for forty shillings damages.

The rest of the Court concurring—

Rule absolute (a).

(a) See *ante*, p. 152, where the Court refused to strike out some of the counts of the declaration, the application being made too late.

Saturday,  
May 14th.

COLLIER, Clerk, *v.* JACOB.

An agreement by a clergyman, to take tithes of wheat by one sheaf out of each shock of ten, progressively, *viz.* the first sheaf of the first shock, the second of the second, the third of the third, and so on:—Held good.

THIS was an action on the case, on the statute 2 & 3 Edw. 6, c. 13, and brought against the defendant, for improperly setting out tithes of wheat.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Bury St. Edmonds*, it appeared that the defendant had set up the wheat in shocks of ten sheaves each, and that one sheaf out of each shock was afterwards taken out and thrown aside, for the plaintiff's tithe, in the following manner, *viz.* the first sheaf, in the first shock; the second, in the second; the third, in the third; the fourth, in the fourth; and so on, progressively. No express agreement, on the part of the plaintiff, as to this mode of setting out the tithes, was proved; but the defendant called witnesses, who swore that the plaintiff had, at a vestry meeting, agreed to take them for the year 1824, according to the above mode. The learned Judge was of opinion, that this mode of tithing was illegal, and could not be supported; but told the Jury, that if they believed the agreement, set up by the defendant, and proved by his witnesses to have been entered into, and that he had, in consequence, set up the corn in shocks, (which he need not otherwise have done), in the manner prescrib-

ed or agreed on at the vestry, to find a verdict for him. The Jury, giving credit to the defendant's witnesses, were of opinion, that the plaintiff had agreed to receive his tithe in the mode as set out by the defendant; and accordingly returned a verdict for the latter.

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COLLIEE  
v.  
JACOB.

Mr. Serjeant *Bosanquet*, on a former day in this Term, obtained a rule *nisi*, on payment of costs, that this verdict might be set aside, and a new trial granted, on the ground that it was against evidence, no agreement by the plaintiff to take the tithe in the manner set out having been proved, but merely his consent to do so at a vestry meeting. He submitted that, even if there had been such an agreement, the mode of setting out the tithe was illegal, and contrary to established custom. That the mode prescribed by the common law is, to separate the tithe from the rest of the wheat, whilst lying on the ground in sheaves, and not after it has been set up in shocks. That if the mode adopted by the defendant should avail, it would be opening a door to the grossest fraud upon the parson, as he had no right to select any sheaf out of each shock, but was to take a particular sheaf set out by the defendant, without having any opportunity of comparing it with others in the same shock; and the latter might have directed one sheaf, of a smaller size than the other nine, to be placed in each shock, so that such sheaf should be thrown out for the tithe.

Mr. Serjeant *Freere* now shewed cause, and insisted, that the verdict, so far from being against evidence, was altogether consistent with it; and although the mode of tithing might in itself be illegal, and contrary to custom, yet the plaintiff having consented to take his tithes as set out by the defendant, he was concluded by his agreement. It is quite clear, that if the plaintiff had agreed to take every tenth shock, it would not have been illegal: and the

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JACOB.

agreement applied to the tithes for one year only; and as the defendant was not bound to set up the sheaves in shocks, there can be no ground to disturb the verdict found for him at the trial.

Lord Chief Justice BEST.—This appears to me to be a most extraordinary mode of titheing. The common law mode of titheing wheat is in the sheaf; and if a farmer adopt any mode of titheing, which excludes or abridges the due means of the parson's comparing the tenth sheaf with the other nine, it is bad. So, there must be, at the time of titheing, a due separation of the tenth sheaf from the rest. And although the agreement in question appears to be absurd, and most prejudicial to the plaintiff's interest, as he could not ascertain the size of the sheaves, or have an opportunity of selecting them after they had been set up in shocks, yet, as he adduced no evidence to contradict or impeach such an agreement, and the Jury believed the defendant's witnesses, who stated, that the plaintiff had consented or agreed that the tithe should be so set out, it would be too much to disturb their verdict. But I cannot approve of such a bargain, which could be of no advantage to the plaintiff, as certain sheaves were to be thrown out for tithe after they had been set up in shocks; whilst, on the other hand, the defendant might have ascertained the size of each of the sheaves before they were set up, and ordered them to be so arranged that the smallest should be thrown out; and if so, the plaintiff could not compare them, as he might have done before they were set up. Besides, this mode of titheing was most likely to lead to a fraud on him; and although the Jury have given credit to the defendant's witnesses, it must be considered that they were tithe payers. And although I am of opinion that an agreement of this description cannot be supported at law, yet, as it was properly left to the Jury to say, whether they believed that the plaintiff had

entered into such an agreement, and they having found in the affirmative, and as the agreement was only to remain in force for one year, this rule must be discharged.

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COLLIER  
v.  
JACOB.

**Mr. Justice BURROUGH (a).**—The legal mode of tithing wheat is by the sheaf. But it is common, in the west of *England*, to tithe it by the shock, that being, from the uncertainty of weather and other causes, more convenient for both the tithe owner and the farmer. Here, however, a difficulty is created as to the sheaves to be thrown out from each shock: but, as the question was, whether or not the plaintiff had himself agreed, that the tithes should be taken in the mode as set out by the defendant; and as that was left to the Jury, and they found in the affirmative, I think their verdict ought not to be disturbed.

**Mr. Justice GASELEE.**—There was not the slightest imputation of fraud by the defendant; and the jury gave credence to the testimony of his witnesses, who proved that the plaintiff assented to the manner in which the tithe was to be set out and taken by him. This rule, therefore, must be

Discharged.

(a) Mr. Justice Park was absent at Chambers.

#### COLLEDGE v. HORN.

*Monday,  
May 16th.*

THIS was an action of *assumpsit*, and brought by the plaintiff to recover from the defendant the sum of 100*l.*,

tute of limitations, in answer to which a letter was produced, addressed by the defendant to the plaintiff's attorney, as follows:—"I this day received your's respecting T. C.'s (the plaintiff's) demand: it is not a just one. I am ready to settle the account, whenever T. C., (the plaintiff) thinks proper to meet me on the business. I am not in his debt 90*l.*, nor any thing like it. Shall be happy to settle the difference, by his meeting me in *London*, or at my house. I shall write Mr. C. (the plaintiff) on the subject."—Held, sufficient to take the case out of the statute: and that the Judge was warranted in telling the Jury, that, after the letter, the statute was out of the question.

*Quare.* Whether an admission by the plaintiff's counsel, in his address to the Jury on a former trial, that part of his client's demand had been satisfied, be receivable in evidence, if his client were in Court and heard it, and made no objection at the time?

In *assumpsit*,  
for goods sold  
and delivered,  
the defendant  
pledged the sta-

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v.  
HORN.

alleged to be due from the latter to the former, for cattle sold, and monies advanced to him. The declaration contained counts for goods sold and delivered, and the usual money counts. The defendant pleaded the statute of limitations.

At the trial, before Lord Chief Baron *Richards*, at the last Assizes at *Hertford*, the plaintiff proved that he had sold a quantity of cattle to the defendant, in *Kent*, as well as beasts at *Barnet* Fair, which had been delivered to him; and in order to take the case out of the statute, a letter, addressed by the defendant to the plaintiff's attorney, in answer to one from him, requiring payment of 91*l.* 12*s.* 8*d.*, was given in evidence, and was as follows:—

“ January 10th, 1820.

“ Sir,—I this day received your's, being at *Margate*, respecting Mr. *Thomas Colledge's* demand: it is not a just one. I am ready to settle the account whenever Mr. *T. C.* thinks proper to meet me on the business. I am not in his debt 90*l.*, nor any thing like it. Shall be happy to settle the difference, by his meeting me in *London*, or at my house. I shall write Mr. *Colledge* on the subject. Your's,  
&c.

*George Horn.*”

The defendant, as to part of the plaintiff's demand, called a witness to prove an admission made by the plaintiff's counsel, in his opening address to the Jury, at a former trial, at *Northampton*, in the presence of the plaintiff, who was then in Court; *viz.* that the sum of 55*l.*, charged in the particulars of the plaintiff's demand, as money advanced, had been repaid to him; but the Lord Chief Baron rejected the testimony of the witness on this point, and, in summing up to the Jury, told them, that after the letter produced by the plaintiff, the statute of limitations was entirely out of the question; and the Jury accordingly found a verdict for the plaintiff for 91*l.* 12*s.* 8*d.*, the amount claimed by him in his particulars, consisting of

two sums, the one of 36*l.* 12*s.* 8*d.*, for the cattle sold in *Kent*, and the other 55*l.* for money lent; and which, it was contended, had been repaid to the plaintiff, according to his counsel's statement on the former trial.

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COLLEGE  
v.  
HORN.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial granted, on the grounds, *first*, that it should have been left to the Jury to say, whether the defendant's letter to the plaintiff's attorney, applied to the demand for which the present action was brought, or whether it amounted to an acknowledgment of an existing debt; as, for any thing that appeared to the contrary, it might have referred to the demand in the former cause, which was tried at *Northampton*, where the plaintiff was nonsuited for not giving material evidence in that county, pursuant to his undertaking: and *secondly*, that evidence of the admission made by the plaintiff's counsel on that trial, as to part of the plaintiff's demand having been repaid him, was admissible on the trial of this cause, and was improperly rejected.

On the Lord Chief Baron's report of the trial being read by Mr. Justice *Gaselee*, it did not appear that the plaintiff was in Court, or heard the alleged admission made by his counsel at the former trial, as his Lordship merely stated, that, in order to prove such admission, a witness was called, and asked, "what was said by the counsel for the plaintiff?" which was objected to by the defendant's counsel; and his Lordship would not allow the witness to answer it, as he considered the objection to be well founded.

Mr. Serjeant *Taddy* now shewed cause, and submitted, as to the latter objection, that a mere statement made by counsel, in his address to a Jury, could not be evidence against his client, in the same manner as admissions formally made, and noted by the Judge as part of the case,

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HORN.

are allowed to be; nor could admissions, so made by counsel, be received, under any circumstances, they being mere suggestions, and analogous to allegations in bills in *Chancery*, which are not receivable in evidence, of any facts therein stated, against the party filing them, as they contain no positive admission, but merely the suggestions of counsel (*a*).

Mr. Serjeant *Vaughan* and Mr. Serjeant *Wilde*, in support of the rule, insisted, that an admission by a plaintiff's counsel, that a particular demand, sought to be recovered by the former, had been satisfied, might be given in evidence, as the counsel must be considered as the agent of his client; and it is quite clear, that declarations made by an agent are receivable in evidence as against his principal. The direction of the Lord Chief Baron to the Jury, that, after the letter of the defendant, the statute of limitations was out of the question, was improper; for, even if equivocal, it should have been left to them to determine, whether or not it contained an acknowledgment of an existing debt; whereas, here, it did not appear to be applicable to the demand which was the ground of the action, but rather seemed to apply to a prior demand, which had already been made the subject of a former action, in which the plaintiff was nonsuited; and which reduced it to a simple matter of fact, which it was certainly within the province of the Jury to determine; and they should have decided whether or not, upon the face of the letter, it appeared that the defendant had made any admission of the debt now sought to be recovered. In *Frost v. Bengough* (*b*), the defendant pleaded the statute of limitations to an action on a promissory note, and the plaintiff gave in evidence a letter written to him by the defendant, which stated, that "business called him to Liverpool, but that

(*a*) See Peake on Evidence, 54.

(*b*) 8 B. Moore, 180; S. C. 1 Bing. 266.

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should he be fortunate in his adventures, the plaintiff might depend on seeing him in *Bristol*; otherwise, that he must arrange matters with him as circumstances would permit;" and Lord Chief Justice *Dallas*, considering the terms of the letter ambiguous, left it to the Jury to say, whether or not it referred to the note; and they having found in the affirmative, the Court held that their verdict was conclusive. Here, however, the defendant made no admission of a debt due from him to the plaintiff; but, on the contrary, stating that his demand was not a just one, merely said that he was ready to settle the account in difference between them; and that, surely, cannot amount to an admission or acknowledgment of an existing debt, so as to take the case out of the statute. In *Rowcroft v. Lomas*(a), in *assumpsit* for money due on an accountable receipt, the defendant having pleaded the statute of limitations, the plaintiff, in order to take the case out of the statute, called a witness, who proved that he called on the defendant, and, shewing him the receipt, asked him if he knew any thing of it; to which the defendant answered, that he knew all about it; and that, on the witness's asking him for the amount, he replied, that it was not worth a penny, and he should never pay it; that it was his signature, but that he never had and never would pay it, "and besides," he added, "it is out of date, and no law shall make me pay it;"—it was held, that this evidence was insufficient to charge the defendant with it, there being no acknowledgment, but, on the contrary, a denial that the debt ever existed. So, in *Hellings v. Shaw*(b), in an action of *assumpsit*, by an attorney, to recover his charges relative to the grant of an annuity, evidence of the defendant's having said, that "he thought it had been settled when the annuity was granted; but that he had been in so much trouble since, that he could not recollect any thing

(a) 4 Mau. & Selw. 457.]

(b) 1 B. Moore, 340,

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about it," was held not to be a sufficient acknowledgment of the debt, to take it out of the statute; and that it was not to be left to the Jury as evidence of the admission of such debt, although the plaintiff proved that his bill was not paid at the time of granting the annuity; and Mr. Justice *Dallas* there said (*a*), " if there be an acknowledgment of a debt, the statute does not apply; but it is necessary that such acknowledgment should be clear and specific." The case of *Beale v. Nind*(*b*), is decisive to shew that there must be precise evidence of an acknowledgment of an existing demand, to take the case out of the statute.

Lord Chief Justice *BEST*.—Two questions have been raised in this case: *first*, whether the letter written by the defendant amount to a sufficient acknowledgment of an existing debt, to take the case out of the statute of limitations. On that point we entertain no doubt whatever. It is not necessary to decide whether or not it ought to have been formally left to the Jury. The tenor of the letter was left to them; and whether the statute applies to the transaction on which the letter is founded, or not, is a question for the Jury; but what the legal effect of such a document may be, is for the Judge to determine; and if I were to put a construction on the letter now before me, I should come to the same conclusion as my Lord Chief Baron did; as there appears on the face of it to be a clear admission of an existing cause of action to the plaintiff within six years, which is sufficient to take the case out of the statute. If it had been merely left to the Jury to say, whether the letter took the case out of the statute, and they had found that it did not, and given a verdict for the defendant, we should have directed a new trial; as there is a clear admission contained in the letter, that some-

(*a*) 1 B. Moore, 345.

(*b*) 4 Barn. & Ald. 568.

thing was due from the defendant to the plaintiff at the time it was written, as he stated that he was ready to settle the account or difference. That of itself imports that something was due from him to the plaintiff; and the amount was a question to be ascertained by the Jury. With respect to the second question, as to the rejection of evidence of the admission made by the plaintiff's counsel at the former trial, it embraces a point of great difficulty and delicacy; and I abstain from giving any opinion until all the facts are fully before us. It does not appear from the notes of my Lord Chief Baron, whether or not the plaintiff was in Court at the time the admission by his counsel was made, or whether he heard it or not, or whether the counsel was authorized in making such a statement, or whether any objection was raised to it at the time. I am therefore of opinion, that there must be a new trial, in order that we may be put in full possession of those facts, which appear to me to be absolutely necessary, before we come to any conclusion on this point.

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**Mr. Justice PARK.**—Whether the meaning of the defendant's letter had been left to the Jury or not, or whether in terms it applied to the transaction in question or not, appears to me to be immaterial, as it is manifest on the face of it that the defendant admitted that something was due from him to the plaintiff. It is therefore absurd to say, that it does not import an acknowledgment of an actually existing debt. With respect to the other question, as the facts stated to us are imperfect, it is quite clear there must be a new trial; and more particularly so, as it raises a question of the greatest importance to gentlemen at the bar, with regard to the degree of caution they are bound to exercise in stating their client's case to the Jury.

**Mr. Justice BURROUGH.**—I have no doubt whatever as to the construction to be put on the terms of the defend-

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ant's letter. It was for the Judge to determine its legal effect, as to whether it amounted to an admission of a debt; and for the Jury to say, whether it applied to the demand for which the action was brought. But with respect to the question, whether a party be bound by the statement or declarations made by his counsel, I wish to know, whether the admission, relied on by the defendant, was heard by the plaintiff at the time. If he were in Court, and heard it, and assented to it, his silence would amount to an adoption; and although an admission by counsel cannot be considered as evidence *per se*, yet a subsequent acquiescence by the client renders it so.

Mr. Justice GASELEE.—I feel no difficulty whatever, as to the objection raised, with respect to the statute of limitations; and although the Lord Chief Baron felt the effect of the defendant's letter, and entertained no doubt upon it, as it appeared to him to contain a clear admission of an existing cause of action at the time it was written, and it was competent to the Jury to come to a different conclusion if they thought that it did not relate to the demand for which the action was brought: and I fully agree with the Court, that, as to the second question, the facts are too imperfectly stated to enable us to come to a decision.

The Lord Chief Justice then said, that it appeared to him, that justice would be done between the parties, if the plaintiff would agree to take 36*l.* 12*s.* 8*d.* in full of his demand, being the amount of the cattle sold to the defendant in *Kent*: and that if he would consent to have the verdict reduced to that sum, the rule for a new trial should be discharged;—if not, to be made

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## LIVETT v. WILSON.

THIS was an action of trespass, for breaking and entering the plaintiff's close, called "The Yard," situate in the parish of *St. Andrew the Great*, in the town of *Cambridge*.

The defendant pleaded several pleas of justification, one of which, (the ninth), was as follows:—"That before and at the said several times, when, &c., he, the defendant, was seised, in his demeane as of fee, of and in a certain messuage and yard, in the parish aforesaid; and that long before any of the said several times, when, &c., to wit, on the 1st January, 1764, at the parish aforesaid, by a certain deed then and there made between one *John Waterfield*, the then owner of the said close of the plaintiff, called 'The Yard,' and who was then seised thereof in his demesne as of fee, and *Thomas Blanks*, and *Mary*, his wife, who were then seised in their demeane as of fee, in right of the said *Mary*, of and in the said messuage and yard; now of the defendant, and whose estates therein he the defendant now hath, but which said last mentioned deed hath since been lost or destroyed by accident, and therefore cannot be produced to the Court here, the date whereof is for that reason wholly unknown to the defendant; the said *John Waterfield*, so being owner of the said close, in which, &c. did grant to the said *Thomas Blanks*, and *Mary*, his wife, in right of the said *Mary*, so then being owner of the said messuage and yard, now of the defendant, and to the heirs and assigns of the said *Mary*, as aforesaid, a certain way from a public highway or street called the *Petty Cury*, into, through, over and along, the said close of the plaintiff, called 'The Yard,' in which, &c., unto and into the said messuage and yard of the defendant, and so back again from the said last mentioned close, into, through, over, and along, the said close, in which, &c., called 'The Yard,' unto and into

In trespass, for breaking and entering the plaintiff's close, the defendant pleaded a right of way, granted by deed to the persons under whom he claimed, but which deed he averred to be lost; the plaintiff replied, traversing the grant. At the trial, it appeared, that the right had been frequently disputed, and the Judge told the Jury, that if they thought that the defendant had uninterruptedly enjoyed the right of way for more than twenty years, it would be presumptive evidence of the existence of a grant; that, if they thought there had been a deed of grant, they would find for the defendant; but if they thought there had been none, then for the plaintiff:— Held, that such direction was right.

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the said public king's highway, called the *Petty Cury*, to go, return, pass, and repass, on foot, in and along the said last mentioned way, at all seasonable hours in the day-time; by virtue of which said grant, the defendant before, and at the said several times when, &c., was, and still is, entitled to such way."

To which the plaintiff replied:—"That the said *John Waterfield*, so being owner of the said close called 'The Yard,' in which, &c., did not grant to the said *Thomas Blanks*, and *Mary*, his wife, in right of the said *Mary*, being the owners of the said messuage and yard, now of the defendant, and to the heirs and assigns of the said *Mary* as aforesaid, a certain way to pass on foot from the said public highway, or street, called the *Petty Cury*, to go, return, pass, and repass, into, through, over, and along the said close, called 'The Yard,' in which, &c." Whereupon issue was joined.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes for the county of *Cambridge*, it was admitted that *John Waterfield* was the owner of the plaintiff's yard, and was seized thereof in fee; and that the premises respectively occupied by the plaintiff and defendant, which adjoined each other, were originally in the possession of one *John Rogers*, who, in 1734, let that part in the occupation of the defendant, to the persons under whom the latter now claimed; but the right of way as set up by him, did not appear to have been reserved by any grant or conveyance; nor was there any direct evidence of a seisin in *Blanks* and his wife. As to the uninterrupted use or enjoyment of the way by the defendant, the evidence was conflicting; but it appeared that this supposed right had been constantly contested, and that the defendant, on his taking, a short time previously to the commencement of the action, some premises adjoining, the entrance to which was through the yard in question, observed that his "right of way from the street to the yard could then no longer be resisted."

The learned Judge, in summing up to the Jury, said, that the principal question for their consideration was, whether or not the defendant had a right of way over the yard in question, or whether or not there had been a grant by deed, as set out by him in his plea; that if they should be of opinion that the defendant had exercised an uninterrupted right of way for more than twenty years, it would be presumptive evidence of the existence of a deed; and that even if such deed had been lost, the defendant would be entitled to their verdict; that it was for them to consider and determine whether or not such a deed had ever existed, or whether, from long enjoyment, its existence might or might not be presumed; but that, if they should be of opinion that there had been no grant by deed, they would find for the plaintiff.

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The Jury said, that they could not find that there existed any deed: upon which the learned Judge again told them, that it was not necessary that they should find the then existence of a deed, as the defendant had stated it to have been lost; but that the question for them to determine was, whether or not, under all the circumstances, they could bring themselves to believe that a grant by deed had ever existed. They then found that there had been no grant of the way by deed, and accordingly gave a verdict for the plaintiff.

Mr. Serjeant Taddy, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, on the ground of misdirection by the learned Judge to the Jury. He submitted, that it ought to have been left to them, that, if they should be of opinion that the owners of the property, before the time of the conveyance, and the defendant since, had had an uninterrupted use of the way in question for more than twenty years, they might presume a deed; and although in

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*Doe d. Fenwick v. Reed* (*a*), where the defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land; and the defendant's family had continued in possession ever since:—it was held, that the original possession having not been taken under any conveyance, the length of possession was only *prima facie* evidence from which a Jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted; and that the Jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed; yet, in that case, the commencement of the defendant's title appeared; and as that would have been insufficient, unless confirmed by a subsequent assurance, the Jury were rightly directed to consider, whether or not they believed that such conveyance or assurance had actually been made; and Mr. Justice Holroyd there said (*b*), “in cases of rights of way, &c., the original enjoyment cannot be accounted for, unless a grant have been made; and therefore it is, that, from long enjoyment, such grants are presumed.”

Mr. Serjeant Wilde, being now about to shew cause, the Court called on—

Mr. Serjeant Taddy to support his rule. He submitted, that, under the circumstances of this case, the question should have been left to the Jury as in *Campbell v. Wilson* (*c*), *viz.* that, if they were satisfied, from the whole of the evidence, that the defendant's enjoyment had been only by leave or favour, or otherwise than as under a claim or assertion of right, it would repel the presumption of a grant; but, that they might presume a grant of a right of

(*a*) 5 Barn. & Ald. 232.

(*b*) Id. 237.

(*c*) 3 East, 297.

way from an adverse user of it for above twenty years, though originating in mistake; and here, as the right of way was frequently contested, it might be considered in the nature of an adverse possession; and, if so, the Jury might take it as a strong ground whereon to found the presumption of a grant; and they should have been told, that if they thought the way had been used uninterruptedly by the defendant for twenty or thirty years, they might presume a grant by deed; whereas it was merely left to them to say, whether the way had been granted by deed or not. In *Holcroft v. Heel* (a), where the grantee of a market had suffered another person to erect another market in his neighbourhood, and use it, without interruption, for more than twenty years, Lord Chief Justice *Eyre* thought it was a bar to the plaintiff's action on the case for a disturbance of his franchise, although it was clear that the user originated without any rightful authority; and although Mr. Justice *Le Blanc*, in *Campbell v. Wilson*, stated (b) that the ground on which that case went off was merely this, that the Court having intimated their opinion, that if the case went down to trial again upon the same facts, it would be left to the Jury to find for the defendant, upon the ground of presumption of a grant, after twenty years' uninterrupted user of the market; yet Lord *Ellenborough* said (c), that the question came to the common case of adverse enjoyment of a way for upwards of twenty years, without any thing to qualify that adverse enjoyment; and Mr. Justice *Lawrence* observed (d), "no doubt but that adverse enjoyment of a right of way for twenty years unexplained, is evidence sufficient for the Jury to found a presumption that it was a legal enjoyment." Where, therefore, there has been a disputed right, or adverse user, for more than twenty years, as in this case, it ought not to have been left

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(a) 1 Bos. & Pul. 400. (b) 3 East, 298. (c) Id. 300. (d) Id. 301.

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to the Jury to find the existence of a deed, but it should have been left to them to say, whether or not from the evidence before them, there were sufficient facts of adverse user for them to presume a grant by deed.

Lord Chief Justice BEST.—I think that the direction of my Brother *Gaselee* to the Jury was perfectly right. He gave every advantage to the defendant which he had any right to expect, and certainly went quite far enough. I do not dispute, that if there had been an uninterrupted user for twenty years, the Jury might have presumed that it originated in a deed; but, even in such a case, a Judge would not be warranted in saying that they *must*, but only that they *might*, presume a deed. And although, from long enjoyment in cases of right of way, a grant may be presumed, as was said by Mr. Justice *Holroyd* in *Doe d. Fenwick v. Reed*, yet he there observed, that, even in these cases, evidence to rebut such a presumption would be admissible. So, if there be circumstances inconsistent with the existence of a deed, it is the duty of a Judge to direct the Jury to consider them, and to decide accordingly; and here the Jury were told, that if they thought that the defendant had exercised a right of way, uninterruptedly, for more than twenty years, it would be presumptive evidence of the existence of a deed; and that, even if such deed had been lost, the defendant would be entitled to a verdict. Here, too, it appeared that the premises occupied by the plaintiff and defendant were formerly held by one person, who conveyed part of them to others by deed, and under whom the defendant now claims; but that conveyance did not reserve the right of way: and although it might have been reserved by a subsequent deed, it certainly was not in the original conveyance. With respect to the user by the defendant, so far from its having been uninterrupted, it appeared to have been constantly

disputed; and that, on his recently taking premises adjacent to the yard in question, he stated that his right of way could no longer be resisted. That shews that he was doubtful whether a prior right existed or not. And it appears to me, that the balance of evidence was clearly against the existence of a deed; and, if so, it would be too much for the Jury to presume a grant by deed.

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**Mr. Justice PARK.**—Nothing but uninterrupted usage for a sufficient length of time can raise a presumption of a grant. Here, however, it appeared that the right of way claimed by the defendant had been frequently contested. I am therefore not only of opinion, that the direction to the Jury was perfectly right, but that, if they had found a different verdict, it could not have been supported.

**Mr. Justice BURROUGH.**—The mode in which this case was left to the Jury, appears to me to be so proper, that I have no hesitation in saying, that I shall adopt it in future. The defendant, in his plea, relied on a grant by deed, instead of by prescription; and if so, the essence of the issue was, whether there had been such a deed as that stated in the plea, from which the Jury might presume the existence of a grant. If there had been such a grant by deed, it is highly improbable that the right of way would have been so constantly disputed. The Jury have not only found that there was no such deed, but that there was no grant of the right of way claimed by the defendant by virtue of such an instrument. This rule, therefore, must be

Discharged.

**Mr. Serjeant Onslow (*amicus curiae*)** stated, that he remembered a case at *Chelmsford*, similar to the present, where Mr. Justice *Le Blanc* left the question to the Jury in the precise terms as was done here.

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An action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong done to the other.—Where, therefore, an action was brought, and a verdict obtained by two plaintiffs against a defendant for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them:—The Court ordered the judgment to be arrested.—But the jury having, by their verdict, confined the damages to the expenses which the plaintiffs had been jointly put to in procuring their liberty, the Court ordered the *postea* to be amended.

BARRATT and HODSOLL v. COLLINS, Gent. One, &c.

THIS was an action on the case, and brought by the plaintiffs jointly, against the defendant, an attorney of this Court, for having caused them to be maliciously arrested. The bill stated, that the defendant, on, &c. at, &c. not then having any reasonable or probable cause of action against the plaintiffs, for which the defendant could or might lawfully cause the plaintiffs to be arrested and held to bail, as thereafter next mentioned; but wrongfully and unjustly contriving and intending to imprison, harass, oppress and injure the plaintiffs, falsely and maliciously caused and procured to be sued and prosecuted, out of the Court of our lord the King of the *Bench*, a certain writ of our said lord the King, called an attachment of privilege, at the suit of the defendant, against the plaintiffs, directed to the sheriff of *Kent*. (Here the writ was set out.) That the defendant, contriving and intending as aforesaid, afterwards, and before the arrest thereafter mentioned, to wit, on, &c. falsely and maliciously, and without having any reasonable or probable cause of action whatsoever against the plaintiffs, for which he could or might, by law, reasonably cause the plaintiffs to be arrested, as thereafter next mentioned, caused and procured the said writ to be, and the same then and there was, marked and indorsed, for bail, &c. That the defendant, afterwards, and before the said return thereof, to wit, on, &c. at, &c. contriving, &c. and without having any reasonable or probable cause of action against the plaintiffs, to the amount of 10*l.* or upwards, falsely and maliciously caused the plaintiffs to be arrested by their bodies, under and by virtue of the said writ, and to be thereupon imprisoned, and kept and detained in prison, for a long space of time, to wit, for the space of four hours then next following, and until they, the plaintiffs, in order to procure their release and dis-

charge from the imprisonment, were forced and obliged to, and did then and there, execute divers, to wit, two bail bonds, with certain other persons as sureties, conditioned for the appearance of the plaintiffs in this Court, on, &c. whereas, in truth and in fact, the defendant, at the time of suing forth the writ, and of the arrest and imprisonment, had not any reasonable or probable cause of action against the plaintiffs, for which they, by the law of this realm, or by the practice of the Court of our lord the King of the *Bench*, could or ought to have been arrested or holden to bail. The plaintiffs then averred, that such proceedings were thereupon had in the suit, that afterwards, to wit, on, &c. a certain rule or order was duly made by the said Court, whereby it was ordered, that the plaintiffs should pay to the defendant, or his agent, 5*l.* 10*s.*, together with costs, to be taxed by one of the Prothonotaries, if the defendant would accept thereof, in full discharge of the suit; and that thereupon all further proceedings in the said action should be stayed: but if the defendant would not accept thereof, in full discharge of the suit, that then the plaintiffs should immediately bring the said sum of 5*l.* 10*s.* into Court, and which sum should be considered as struck out of the declaration, and be paid out of Court to the defendant or his agent; and that upon the trial of the issue, the defendant should be permitted to take a verdict for so much only as he should prove, beyond the said sum of 5*l.* 10*s.* The plaintiffs then averred, that afterwards, to wit, on, &c. at, &c. they did bring into Court, in the suit, the sum of 5*l.* 10*s.*, in the said rule or order mentioned, and that the costs of the defendant in the suit were duly taxed by one of the Prothonotaries, at the instance and request of the defendant, at the sum of 15*l.* 10*s.*, which sum, together with the sum of 5*l.* 10*s.*, was afterwards, to wit, on, &c. to wit, at, &c. duly paid to the defendant; and that he did then and there accept the same, together with the sum of 5*l.* 10*s.*,

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in full discharge of the suit; and that the said action was, and is, by means of the premises, and according to the course of practice of the said Court, wholly discharged, ended, and determined, to wit, at, &c.—By means of which said several premises, the plaintiffs, whilst they were so imprisoned, not only suffered great pain of body and mind, and were greatly exposed and injured in their credit and circumstances, and were hindered and prevented from performing and transacting their lawful affairs and business, by them, during that time, to be performed and transacted, but were also forced and obliged to lay out and expend, and did necessarily lay out and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of 50*l.*, in and about the obtaining their release from the said arrest and imprisonment, and in and about other the premises, and have been and are, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c.

The defendant pleaded the general issue, and the Jury found that the plaintiffs had sustained a joint damage, and been put to an expense to the amount of 20*l.* in obtaining their release from prison, and accordingly gave them a verdict for that sum.

Mr. Serjeant *Vaughan*, in the course of the last Term, obtained a rule, calling on the plaintiffs to shew cause why the judgment should not be arrested; and contended, that they could not maintain a joint action against the defendant; or that, at all events, the declaration could not be supported, as it alleged that the plaintiffs had sustained a joint damage by means of the arrest and imprisonment; which is clearly bad, according to the principle laid down by Mr. Serjeant *Williams*, in a note to the case of *Coryton v. Lithebye* (a), viz. that two persons cannot

(a) 2 Wms. Saund. 117 a.

join in an action of false imprisonment, or assault and battery; for the imprisonment and battery done to one, cannot be the same as that done to another. And he cites *Owen* (*a*), *Brooke's Abridgment* (*b*), and *Fitzherbert's Abridgment* (*c*), in support of that position. If so, the plaintiffs ought to have commenced separate actions against the defendant, as the personal feelings and character of the one might receive a more serious injury than those of the other: and although in *Cook v. Batchellor* (*d*), it was held, that two or more partners may join in an action of slander, for words spoken of them in the way of their trade, on averring special damage in the declaration: yet, there, the damages were joint and entire to the plaintiffs, as copartners, who were jointly interested; and a multiplicity of actions would be created in such a case, if the contrary doctrine were established.

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Mr. Serjeant *Pell* and Mr. Serjeant *Taddy* shewed cause on a former day in this Term. The plaintiffs have expressly alleged, by way of special damage, that they were obliged to, and did necessarily, lay out and expend 50*l.* in obtaining their release from the arrest and imprisonment. That, therefore, was a joint expense, resulting from an injury to both; and the Jury have confined their verdict to such expenses alone. In *Ward v. Brampton* (*e*), two churchwardens joined in an action for a false return to a *mandamus*; and after verdict for the plaintiffs, it was moved, in arrest of judgment, that they ought not to join in the action, as the wrong or damage to one, was not a wrong or damage to the other, and that the office of one was not the office of the other; but judgment was given for the plaintiffs, on the ground that the *mandamus*, and the whole prosecution and *charge thereof*, were joint; and that it was

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| ( <i>a</i> ) 106.                      | ( <i>c</i> ) Tit. "Joinder in Action," 17. |
| ( <i>b</i> ) Tit. "Joinder in Action," | ( <i>d</i> ) 3 Bos. & Pul. 150.            |
| 68.                                    | ( <i>e</i> ) 3 Lev. 362.                   |

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not an office of profit, nor was the action brought for that, but for the unjust return, by which they were put to the charge of the *mandamus*. So here, the plaintiffs incurred a joint expense, in consequence of being maliciously held to bail by the defendant. The ground of the decision of the Court in *Cook v. Batchellor* was to avoid a multiplicity of suits. But it is a well known principle, that where two or more are jointly entitled, or have a joint interest, they may join in the same action, as in *Winterstoke Hundred's* case (*a*), where it was held, that two persons, having been robbed, on the highway, of a joint sum of money, might join in an action against the hundred; on the ground that they were jointly entitled to the damages to be recovered against the hundred; and the same principle was laid down in *Leonard* (*b*). Here, all the circumstances attending the arrest were set out in the declaration, from which it is evident that the plaintiffs have sustained a joint damage by the expenses incurred and paid by them in obtaining their liberation from prison. In *Dalby v. Dorthall* (*c*), an action on the case in nature of a conspiracy was brought by husband and wife, for causing them to be indicted of felony, falsely and maliciously, and to be kept in prison till acquitted, *ad damnum ipsorum*, &c.; and after verdict and judgment for the plaintiffs, error was brought and assigned, because it was *ad damnum ipsorum*, as a wife could not join with her husband for damages, because it was a several damage to either of them: and of that opinion was Mr. Justice *Berkeley*; but Mr. Justice *Croke* held the contrary, because the action was grounded upon one entire record, by which they were both prejudiced. On these authorities, this action was well brought, or, at all events, the plaintiffs are entitled to retain the verdict found for them, as it was confined to the expenses they had been jointly put to in obtaining their release from prison, where

(*a*) *Dyer*, 370 *a*, pl. 59.

(*b*) Vol. 2, p. 12.

(*c*) *Cro. Car.* 553.

they had been confined through the improper conduct of the defendant.

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Mr. Serjeant *Vaughan*, in support of the rule, was stopped by the Court.

Lord Chief Justice BEST.—I am extremely anxious to save the plaintiffs the expense of bringing another action; and although the Jury found that they had sustained a joint damage by the expenses incurred and paid by both, yet they have alleged the imprisonment by way of special damage; and it is quite clear, that what one man suffers from such a cause may be altogether different from the injury that may accrue to another from the same cause. The principle is most ably and satisfactorily laid down by Mr. Serjeant *Williams*, in his note to *Coryton v. Lithebye*, viz. that where two have a joint interest, they may join in the same action, but that they cannot do so, where the wrong done to one is no wrong done to the other, as in the case of false imprisonment or assault and battery. This rule, therefore, must be made absolute.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—In *Dyer* (a), it was held, that an action of slander does not lie by two jointly against a defendant, on the ground that the tort which one had received by the words spoken, was not the tort which the other had, and therefore that they ought to have severed in their actions, as in a case of false imprisonment; and here the plaintiffs have mixed up the fact of such imprisonment, and the expenses they were put to in procuring their discharge, by way of special damage, in the declaration; and it was impossible for a Jury to say, what damages each might have sustained in consequence of the imprisonment.

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**Mr. Justice GASELEE.**—The plaintiffs should have confined their special damage to the expenses they had actually been put to, or paid; whereas, the declaration sets out not only a joint damage, but also a separate damage done to each, in consequence of the imprisonment.

Rule absolute (a).

(a) Mr. Justice *Gaselee*, afterwards said, that he had looked at the case of *Hambleton v. Veere*, 2 Wms. Saund. 169, where the plaintiff having declared against the defendant for procuring his apprentice to depart from his service, and for the loss of his service for the whole residue of the term of his apprenticeship, and the Jury assessed damages generally: the judgment was arrested, because it appeared that the term was not expired; but a distinction is there taken by Mr. Serjeant *Williams*, n. 1, *viz.*—that in covenant against an apprentice for leaving his master's service before his time, whereby the plaintiff lost his service, for the said term, which was not then expired; the plaintiff demurred:—and Mr. Justice *Twyden* said, that though it had been adjudged to be naught after

verdict, yet, being on demurrer, it might be helped; for the plaintiff might take damages for the departure from the service only, and not for the loss of service during the term, and then it would be well enough. So here, as the Jury have confined the damages to the expenses incurred by the plaintiff in procuring their discharge from imprisonment, the *postea* may be amended in that respect; and *Smith v. Hickson*, Cas. Temp. *Hardwicke*, 54, S. C. 2 Str. 977, established the principle, that, in actions on torts, it is sufficient for the plaintiff to prove any one charge in his declaration: and as the plaintiffs proved, as they had alleged, by way of special damage, that they had incurred a joint expense, and the Jury confined their verdict to that part only, it must be entered accordingly.

# CASES

ARGUED AND DETERMINED

IN THE

## Courts of Common Pleas

AND

## Exchequer Chamber,

IN TRINITY TERM,

IN THE SIXTH YEAR OF THE REIGN OF GEORGE IV.

1825.

GLOVER v. MONCKTON.

THE following case was directed, by his Honor the Master of the Rolls, to be sent for the opinion of the Judges of this Court:—

“ *William Cheshire Glover* (the father of the plaintiff), by his last will and testament, duly executed and attested to pass real estates, devised as follows:—‘ I devise all my

A testator devised all his real and personal estates to trustees, and their heirs, upon trust to pay out of the rents 250*l.* yearly, towards the maintenance of his daughter, until she should

attain twenty-one, or marry with the consent of the trustees; and to apply so much of the residue of the rents &c., as they should think necessary, for the maintenance of his son, until he should attain twenty-one, or his sister should marry; and, on his attaining twenty-one, or the marriage of his sister, that the trustees should raise 5,000*l.* by mortgage, sale, &c., of all or any part of the testator’s messuages, &c. and stand possessed thereof, upon trust to pay the same, and the interest thereon, to the daughter, when she should arrive at twenty-one, or marry; and, subject to the payment of such sum, that the trustees should stand seized of the residue of the testator’s property, in trust for his son, until he should attain twenty-one, and when he should have attained the age of twenty-one, then to the use of, and in trust for, the son, his heirs, executors, administrators, and assigns, for ever; but in case the son should not live to attain twenty-one, and the daughter should be living at the time of his decease; or in case the son should live to attain twenty-one, and afterwards die without lawful issue, then the testator devised his real estates to the use of the trustees until the daughter should attain twenty-one, or marry, and then to the use of his daughter, for life; remainder to the trustees, to support contingent remainders; with divers remainders over. The son and daughter both attained twenty-one, but the 5,000*l.* was not raised:—Held, that the legal estate in the real estates was vested in the trustees, and would continue so until the 5,000*l.* was raised, as directed by the will; and that the son would have taken an estate in fee in such estates, with an executory devise over in the event of his dying without issue living at his death, in case the devise to him had been made without the intervention of trustees, he having attained the age of twenty-one.

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messuages, &c., and goods, chattels, debts, &c., to *Thomas Birch* and *William Henry Hammond*; to hold the same to them, their heirs, executors, and administrators, on the several trusts following; that is to say, that they, or the survivor of them, or the heirs, executors, or administrators, of such survivor, shall, by and out of the rents, issues, profits, and produce, of all or any part of the said messuages, &c., yearly, and every year, pay and apply the sum of 250*l.* towards the maintenance and education of my daughter, *Ann Julia Glover*, or so much thereof as will be necessary for that purpose; the residue thereof to accumulate for the use and benefit of my said daughter, and be paid or made payable to her, when she shall arrive at the age of *twenty-one* years, or on the day of her marriage with the consent of the said trustees, whichever shall first happen: and upon further trust, that they shall pay and apply so much of the residue of the rents, produce, and profits of the said messuages, &c., as they shall, in their discretion, think necessary for the maintenance and education of my son, *William Cheshire Glover* (the plaintiff), until he shall attain the age of *twenty-one* years, or the day of the marriage of my said daughter *Ann Julia Glover*, which shall first happen; and when and as soon as my said son shall have attained the age of *twenty-one* years, or my said daughter shall be married with such consent as aforesaid, then upon this further trust, *viz.* that my said trustees shall, with all convenient speed, by mortgage, sale, or other disposition of all or any part of the said messuages, &c., levy and raise, or borrow and take up at interest, the sum of 5,000*l.*, and shall stand possessed thereof, when so raised as aforesaid, upon trust, to pay the same, and the interest thereon, from time to time, when my said daughter shall arrive at the age of *twenty-one* years, or be married with such consent as aforesaid, unto my said daughter: but in case my said daughter shall arrive at the age of *twenty-one* years, or be married, in my

life-time, then my will and meaning is, that the said sum of 5,000*l.* shall be raised and paid, in manner aforesaid, as soon as conveniently may be after my decease, with interest from the time of my decease; and, subject to the payment of the said sum of 5,000*l.*, so to be raised as aforesaid, and the interest thereof in manner aforesaid, then, that the said trustees shall stand and be possessed of the residue of the said messuages, &c., after such sale or other disposition as aforesaid, in trust for the sole use and benefit of my said son, until he shall attain the age of twenty-one years, and when and so soon as he shall arrive at the age of twenty-one years, then, subject as aforesaid, *to the use of, and in trust for, my said son, his heirs, executors, administrators, and assigns, for ever,* according to the nature of the said estates respectively; *but, in case my said son shall not live to attain such age of twenty-one years,* and my said daughter shall be living at the time of the decease of my said son; *or, in case my said son shall live to attain such age of twenty-one years, and shall afterwards die without lawful issue,* then, as to, for, and concerning all my said messuages, I devise them to the use of the said trustees, and the survivors or survivor of them, and the heirs and assigns of such survivor, until my said daughter shall attain the age of twenty-one years, or the day of her marriage with such consent as aforesaid, *and then to the use of my daughter, for life;* remainder to trustees to support contingent remainders; remainder to the first and other sons of the testator's daughter, in tail male, successively; remainder to the daughters of his daughter, as tenants in common, in tail, with cross remainders, between them; remainders over, in like manner, to the testator's brother and nephew, successively, for life (with trustees to support contingent remainders), and to their sons, successively, in tail general; remainder to the testator's own right heirs.'

" The residuary clause was as follows:—‘*And as to, for,*

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*and concerning, all my personal estate, if my said son shall not live to attain the age of twenty-one, or, living to attain such age, shall afterwards die, and not leave lawful issue of his body—then I bequeath the same to my said trustees in trust, &c. &c.: Provided always, that, in case it shall be necessary, for raising the said sum of 5,000*l.* bequeathed to my said daughter, and for other the purposes contained in my will, either to make sale, or otherwise dispose of or mortgage all or any part of my said messuages, &c. &c., I hereby give the said trustees full power and authority so to do; and their receipts shall be a sufficient discharge to the purchaser; and I also empower them at any time to lay out and invest any part or parts of my personal estate at interest, on real or other securities, in some of the public funds, and from time to time to alter and transfer such securities and funds.'*

"At the time of the commencement of this suit, the devisor's daughter, *Ann Julia Glover*, had attained the age of twenty-one; but the 5,000*l.* had not been paid or raised out of the real estate; and the testator's personal estate was not sufficient to discharge it.

"The questions for the opinion of the Court were—What estate did the said *William Cheshire Glover*, the devisee, take in the testator's real estate, under the limitations in his said will, he, the said *William Cheshire Glover*, the devisee, having attained the age of twenty-one years.

"If the Court should be of opinion that the trustees, the said *Thomas Birch* and *W. H. Hammond*, took the legal estate, in fee, under the limitations in the said will, then—

"Whether the said *William Cheshire Glover*, the devisee, would have taken any, and what, estate in the testator's real estates, by virtue of his said will, in case the devise to him had been made without the introduction of trustees, he, the said *William Cheshire Glover*, having so attained his age of twenty-one years."

The case came on for argument in the course of the last Term.

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Mr. Serjeant *Peake*, for the plaintiff.—Under this devise, *William Cheshire Glover*, the plaintiff, took an estate tail in the premises, which vested in him immediately on the death of the devisor; and it is unnecessary to consider whether it were a legal or an equitable estate, as the trustees took only a chattel interest, determinable on the plaintiff's attaining the age of *twenty-one*. It is a settled rule of law, that, where there is a sufficient estate of freehold to support a contingent remainder, it cannot be construed as an executory devise; and it is also an established principle, that, if a testator in his will use words which indicate an intention to confine the generality of the expression of "dying without issue," to dying without *issue living at the time of the person's decease*, they will be so construed to effectuate the intent of the testator. In *Forth v. Chapman* (a), Lord Chancellor *Parker* took a distinction between real and personal estate, and said: "The reason why a devise of a freehold to one for life, and, if he die without issue, then to another, is determined to be an estate tail, is in favour of the issue, that such may have it, and the intent take place; but there is the plainest difference betwixt a devise of a freehold, and a devise of a term for years; for, in the devise of the latter to one, and, if he die without issue, then to another, the words 'if he die without issue,' cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it." In *Dansey v. Griffiths* (b), the testator devised lands to his eldest son, *R. D.*, and his heirs; but if it should happen that *R. D.* should die and leave no issue, then to his son *W. D.* and his heirs: and it was held, that *R. D.* took an estate tail. That is a far stronger case than the present,

(a) 1 Peers Wms. 667.

(b) 4 Mau. & Selw. 61.

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the devise there being to *W. D.* in case *R. D.* should die and *leave* no issue, which might apply to issue living at the time of his death, and not to a total failure of issue; whereas, in this case, the words of the devise are, if the devisee (the plaintiff) "shall die without lawful issue," which must be construed to mean a general failure of issue, and not to be confined to issue living at the time of his death. In *Doe d. Ellis v. Ellis* (*a*), under a devise of land to the testator's son *Joseph*, his heirs and assigns, for ever; but in case his son should *die without issue*, *then* to go to the child of which his second wife was *en ci-ente*; it was held, that the son *Joseph* took an estate tail; and although it was contended, that the intention of the testator was, that his son should take a fee if he had issue, as he used the word *then*, which must refer to the time of the death; yet Lord *Ellenborough* said, that the word *then*, which was merely a word of relation, and not an adverb of time, made no difference: and that the general rule was clear, that the words, "in case my son *Joseph* shall die without issue," must be construed to mean, a general failure of issue. In *Tenny d. Agar v. Agar* (*b*), under a devise of lands to the testator's son, and his heirs, for ever; as to part of the lands, upon condition that he should pay to the testator's daughter a certain annual sum, till she came of age, and then pay her a certain sum; and, in default of payment, that she should enter upon and enjoy the said part to her and her heirs for ever; and in case his *son and daughter* both died without *leaving* any child or issue, he devised the reversion and inheritance of *all* the lands to another:—it was held, that the devise over was not an executory devise, but a remainder limited after successive estates tail of the son, and also of the daughter, by implication; the intent being apparent, that the devise over should not take effect till after failure of the issue of the son and daughter,

and that it should then take effect; and Lord *Ellenborough* there said: (a) "That nothing could be clearer than that the remainder-man was not intended to take anything, until the issue of the testator's son and of his daughter were all extinct. The estate, therefore, to the remainder-man was only to commence after the extinction of the lines of issue of his own son and daughter; and that intent can only be effected, by giving to the son and daughter successive estates tail." And Mr. Justice *Le Blanc* said: "There is no case where the words 'die, without leaving issue,' simply have been adjudged to mean 'without leaving issue at the time of the death.'" Although in *Roe d. Sheers v. Jeffery* (b), a testator devised a dwelling-house to his grandson, *T. F.*, and his heirs, for ever, but in case his said grandson should depart this life and leave no issue, then his will was, that the said dwelling-house should be and return to *E., M., and S.*, or the survivor or survivors of them, share and share alike; it was held, that the devise to *E., M., and S.*, was a good executory devise; yet Lord *Kenyon*, in delivering the judgment of the Court, said: (c) "On looking through the whole of this will, we have no doubt but that the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, and life estates are only given to them. Now, taking all this into consideration together, it is impossible not to see that the failure of issue intended by the testator was to be a failure of issue at the death of the first taker; and if so, the rule of law is not to be controverted."—Although the distinction taken in *Forth v. Chapman*, between real and personal property, was doubted, if not denied, by Lord *Kenyon*, in *Porter v. Bradley* (d), as he there considered the words, "leaving issue," as having a

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(a) 12 East, 259.

(c) Id. 596.

(b) 7 Term Rep. 589.

(d) 3 Term Rep. 146.

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confined relation to the time of the death of the parent, in cases both of real and personal estate; yet he afterwards said, in *Roe v. Jeffery*, that the distinction taken in *Forth v. Chapman*, that the very same words in the same clause in a will, should receive one construction as applied to one species of property, and another construction as applied to another, was not reconcileable with reason; but that if it had become a settled rule of property, it might be dangerous to overturn it.. So, in *Dainty v. Dainty*, his Lordship admitted the distinction, and said (a) "that, as to the real estate, the devisee took an estate tail; as to the personalty, he took for life;" and that it was precisely like the case of *Forth v. Chapman*, where Lord *Macclesfield* relied on the word, "leaving," saying that, when used in the limitation of personal property, it is confined to "leaving issue at the time of the death:" and in *Crooke v. De Vandes* (b), Lord *Eldon* said: "When I read the cause of *Porter v. Bradley*, speaking with all due deference to the learned Judge who expressed that *dictum*, it appeared to me, that it went to shake settled rules to their very foundation. I had heard the case of *Forth v. Chapman* cited for years, and repeatedly by Lord *Kenyon* himself, as not to be shaken. I never knew it shaken."—It is immaterial to consider, whether the trustees took a legal or an equitable estate, as they only took a chattel interest, determinable on the plaintiff's attaining the age of twenty-one. The general rule is laid down by Lord *Ellenborough* in *Doe d. White v. Simpson* (c), *viz.*, "That where the purposes of a trust can be answered by a less estate than a fee-simple, a greater interest than is sufficient to answer such purpose shall not pass to them; but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute." So, *Hawker v. Hawker* (d) was decided on the

(a) 6 Term Rep. 307.

(b) 9 Ves. 203.

(c) 5 East, 171.

(d) 3 Barn. &amp; Ald. 537.

principle, that trustees are to have no greater estate than is necessary for the purposes of the trust; and in *Warter v. Hutchinson* (*a*), where lands were devised to trustees, for certain purposes, it was held, that they only took a chattel interest; and here, as it was the intent of the testator, that the sum of 5,000*l.* should be raised for his daughter's portion, it was unnecessary for the trustees to take more than a term for that purpose; and if they can be considered to take the legal estate in fee, it would be altogether inconsistent with the power to raise such sum by sale or mortgage.

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**Mr. Serjeant Wilde, contra.**—The plaintiff took an equitable estate in fee, with an executory devise over, in the event of his not leaving issue living at the time of his death; and it is immaterial to consider, whether the trustees took a legal or equitable estate, as their interest would be the same in either case. Although it is an established rule, that where lands of inheritance are devised to a person and his heirs, and if he die without issue, then over, it creates an estate tail in the first taker; yet the Court must look at the whole of a will, to see what estate the testator intended should be given, and whether such intent can be legally carried into effect; and here, it evidently appears not to have been the intention of the testator to give the plaintiff an estate tail. The will contains several provisions which are not inserted or to be found in any of those instruments which have been the subject of former decisions. In *Roe d. Sheers v. Jeffery*, the devise was in terms similar to the present. The estate was given to the first taker, and his heirs for ever; and the Court held, the first estate to be a fee, and the remainder over, a good executory devise. So, in *Doe d. Smith v. Webber* (*b*), a devise to *M. H.*, her heirs, &c., for ever; and in case she should happen to die, and leave no child

(*a*) 5 B. Moore, 143; S. C. 1 Barn. & Cres. 721; 3 Dow. & Ryl. 58.

(*b*) 1 Barn. & Ald. 713.

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or children, then to *J. B.*, and her heirs for ever, paying the sum of 1,000*l.* to the executor or executors of *M. H.*, or to such person as she, by her will, should appoint; it was held, that the words "child or children," were synonymous with "issue," and that this was not the devise of an estate tail to *M. H.*, but of an estate in fee to *M. H.*, with a good executory devise over to *J. B.*, in case *M. H.* died, leaving no issue living at her death. So here, it is quite clear that the testator meant to refer to the failure of issue at the time of the death, and not to an indefinite failure. If the daughter had died first, and the son afterwards, but before he had attained twenty-one, it would be an absolute estate in fee in him, descendible to his heir at law; if not, no meaning can be given to the words of inheritance which accompany the devise to the first taker. The whole of the clauses in the will must be taken together, and connected with each other, and from them it is evident that an equitable estate in fee was created in the plaintiff, and more particularly so, as the will appears to have been framed by a skilful person. On the whole, therefore, the true construction of the will must be to give the plaintiff an equitable estate in fee, with an executory devise over in case of his not leaving issue living at the time of his death.

Mr. Serjeant *Peake*, in reply.—The intent of the devisor, to be collected from the whole of his will, is, that the estate was not to go over till a general failure of issue of the first taker; and if so, it is quite clear, that the plaintiff took an estate tail, although he might have taken an equitable estate in fee in the first instance. The effect of the whole of the will is, to devise the testator's real property to his son, the plaintiff, and his heirs, on his attaining the age of twenty-one; and although it has been said, that the will is technically drawn, yet it is evident, from its whole context (in which the provision in respect of the personal property of the testator must be included,) that the plaintiff did not take an estate tail.

that the son, *W. C. Glover*, the devisee, took an estate tail. The case of *Doe d. Smith v. Webber*, is distinguishable, as there the testatrix directed the sum of 1,000*l.* to be paid out of the real estate to the executors of *M. H.*, who was then in existence, or to such persons as she should, by will, direct. There, too, the payment was to be made by the person in remainder, which shewed, that the event contemplated by the testatrix was an approximate, and not a remote, event, *viz.* a failure of children or issue, at the death of *M. H.*, and not an indefinite failure of issue, which might happen at any remote period.

Shortly after the last Term, the following certificate was sent to the Master of the Rolls:—

" We have heard this case argued by counsel; and, having considered it, are of opinion that the legal estate in the real estates of the testator is in the trustees, *Thomas Birch* and *William Henry Hammond*, and will continue so until the 5,000*l.* shall have been raised, as directed by the will. And that *William Cheshire Glover*, the devisee, would have taken an estate in fee in the said testator's real estates, by virtue of his said will, with an executory devise over in the event of his dying without issue living at his death, in case the devise to him had been made without the intervention of trustees, he, the said *William Cheshire Glover*, the devisee, having so attained his age of twenty-one years.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

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MARY PULLIN, Wife of S. PULLIN, by T. BARNES, her next friend, and Others,—*v.* SAMUEL PULLIN, PEARSALL, and ANDREWS.

The testator, by his will—reciting that he was seized of divers freehold messuages, and of certain copyhold lands in the parish and manor of *I.*, all which freehold and copyhold lands were subject to a mortgage to *S. R.*—devised all and every his said freehold and copyhold messuages &c., to *B. P.*, and *W. A.*, and their heirs, upon trust, for certain purposes declared in his will; and he gave all the rest of his freehold, copyhold, and leasehold estates, and all his personality, to his son *S. P.* The testator, at the time of making his will, and at the time of his death, was also seized in fee of twenty-one acres of land, in *I.*, lying separate from, and unconnected with, the lands mortgaged to *S. R.*, and not included in that mortgage; as well as of leasehold estates elsewhere:—Held, that the twenty-one acres, not comprised in the mortgage, passed to the testator's son, *S. P.*, under the residuary clause.

THE following case was sent, by the direction of his Honor the Master of the Rolls, for the opinion of the Judges of this Court:—

“ *Samuel Pullin*, the elder, formerly of *Islington*, in the county of *Middlesex*, now deceased, was, at the respective times of making his will, as herein-after mentioned, and at his death, seized in fee simple of certain freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the parish of *St. Mary, Islington*; and he was also, at the respective times aforesaid, seized to him and his heirs, according to the custom of the manor of the prebendary of *Islington*, of certain copyhold or customary lands and hereditaments, within, and holden of the said manor, which were also situate in the said parish of *St. Mary, Islington*; the whole of which said freehold and copyhold messuages, lands, tenements, and hereditaments, were, at the respective times aforesaid, subject to a mortgage thereof made by him, the said *Samuel Pullin* the elder, to *Samuel Rhodes*, of *Islington*, aforesaid, by indentures of lease and release, bearing date respectively the 27th and 28th *March*, 1812; and by a conditional surrender of the said copyhold lands and hereditaments for securing to the said *Samuel Rhodes*, his executors, administrators, and assigns, the re-transfer into his and their name or names of the sum of 10,125*l.* 16*s.* 6*d.* three *per cent.* Consolidated Bank Annuities; and also the payment, until such re-transfer, of such sum or sums of money as he, the said *Samuel Rhodes*, would have been entitled to receive, as and for the dividends of the said sum of 10,125*l.*

16s. 6d., three *per cent.* Consolidated Bank Annuities, if the same had remained standing in his name. The said *Samuel Pullin* the elder, was also, at the respective times aforesaid, seised in fee simple of certain other freehold lands and hereditaments, containing twenty-one acres or thereabouts, also situate in the said parish of *St. Mary, Islington*, but lying separate from, and unconnected with, the other freehold and copyhold messuages, lands, tenements, and hereditaments, which were comprised in the said mortgage, to *Samuel Rhodes*; as before mentioned, and held under a title separate and distinct from the title to the other freehold and copyhold messuages, lands, tenements, and hereditaments; and the said freehold lands and hereditaments hereinbefore mentioned to contain twenty-one acres, or thereabouts, were not, at the respective times aforesaid, or at any time, subject to, or comprised in, the said mortgage to *Rhodes*; but the same were, at the respective times aforesaid, subject to a mortgage thereof made by the said *Samuel Pullin* the elder to one *Sarah Pritchard*, by indentures of lease and release, bearing date respectively the 1st and 2d days of *January, 1798*. The said *Samuel Pullin* the elder was also, at the respective times aforesaid, possessed of certain leasehold closes of land, situate in the said parish of *St. Mary, Islington*, and also of a considerable leasehold estate, in the parishes of *St. James*, and *St. John, Clerkenwell*, in the county of *Middlesex*; and he was also, at the respective times aforesaid, seised of certain copyhold messuages and hereditaments, situate at *Edgware*, in the county of *Middlesex*; but he was not seised of, or entitled to, any other freehold messuages, lands, tenements, or hereditaments, either in the parish of *St. Mary, Islington*, or elsewhere. The said *Samuel Pullin* the elder, being so seised and possessed as aforesaid, duly made and published his last will and testament in writing, bearing date the 12th *November, 1814*, which was duly executed and attested to pass real estates; and thereby, after giving a

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few pecuniary legacies, and, among others, to *Benjamin Pearsall* and *William Andrews*, the sum of 100 guineas each, the testator devised as follows:—

“ ‘ And whereas, I am seised in fee simple, or otherwise entitled to the inheritance of and in divers freehold messuages, lands, tenements, and hereditaments, situate within in the parish of *St. Mary, Islington*, in the county of *Middlesex*, and am also seised, to me and my heirs, according to the custom of the manor of the prebendary of *Islington*, otherwise *Isledon*, in the county of *Middlesex*, of certain copyhold or customary lands and hereditaments within and held of the said manor (which copyhold or customary lands and hereditaments I have duly surrendered, or intend to surrender, to the use of this my last will), and all which freehold and copyhold messuages, lands, and hereditaments, are subject to a mortgage thereof, made by me to *Samuel Rhodes*, of *Islington*, aforesaid, for securing to him the re-transfer of the sum of 10,125*l.* 16*s.* 6*d.* three per cent. Consolidated Bank Annuities, lent me by him; and also for securing to him the payment, until such re-transfer of such sum or sums of money, as he would have been entitled to receive for dividends on the said stock, if the same had remained standing in his name; now I do hereby give and devise all and every my said freehold and copyhold or customary messuages, lands, and hereditaments, with their appurtenances, unto the said *Benjamin Pearsall* and *William Andrews*, and their heirs, to the use of them and their heirs: nevertheless, upon the trusts, for the intents and purposes, and with, under, and subject to, the powers and provisoies hereinafter declared and contained of and concerning the same.’

“ The testator then proceeded by his will to declare the trusts of the said devise, which were, for the benefit of his natural son, *Samuel Pullin* the younger, and of *Mary Pullin*, then and now the wife of *Samuel Pullin* the younger, and of any future wife of *Samuel Pullin* the younger, and of the child or children, grandchild or grandchildren,

or other issue of *Samuel Pullin* the younger, in the manner therein mentioned, with benefit of survivorship, among the children of *Samuel Pullin* the younger, and in default of issue of *Samuel Pullin* the younger, for the benefit of the appointees of *Samuel Pullin* the younger; and, in default of such appointment, for the benefit of the right heirs of the testator; with the usual powers to the trustees to apply the rents and profits of the said estates for the maintenance of any child or children of *Samuel Pullin* the younger, during their respective minorities. The testator thereby also gave a power to *Samuel Pullin* the younger, during his life, and, after his decease, to the trustees, to grant such building and other leases as therein mentioned. The will also contained the usual clauses for the appointment of new trustees, and for indemnifying them; and the testator, after giving to his servant *Mary Johnson*, during her life, an annuity of 20*l.*; to be paid out of the *residuary personal estate*, proceeded as follows:—

“ ‘ And all the rest, residue, and remainder, of my freehold, copyhold, and leasehold estates, whatsoever and wheresoever, and of every nature and kind, with their respective appurtenances, and all my interest therein respectively, and also all my goods, chattels, and personal estate, whatsoever and wheresoever, I give, devise, and bequeath, unto my said son, *Samuel Pullin*, his heirs, executors, administrators, and assigns respectively, according to the respective natures and tenures thereof, and to and for his and their absolute use and benefit, and I appoint him sole executor of this my will.’

“ The testator died in the month of *January*, 1816, without having altered or revoked his will, leaving the trustees, *Benjamin Pearsall* and *William Andrews*, and his son *Samuel Pullin*, him surviving.”

The question for the opinion of the Court was: “ Whether the freehold lands and hereditaments, hereinbefore mentioned, as containing twenty-one acres or thereabouts,

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which were not comprised in the mortgage to *Samuel Rhodes*, passed, by the devise, to the trustees, *Benjamin Pearsall* and *William Andrews*, and their heirs; or, whether the same passed, by the residuary devise and bequest, to *Samuel Pullin* the younger, his heirs, executors, administrators, and assigns."

The case came on for argument in the course of the last Term.

Mr. Serjeant *Wilde*, for the trustees, *Benjamin Pearsall* and *William Andrews*.—The question in this case turns solely on the intent of the testator, which must be collected from the whole of his will, by which it is evident that he meant to devise to the trustees all his freehold and copyhold lands, which were described in the recital as being situate in the parish of *St. Mary, Islington*, and not to limit them to those messuages and lands which were mortgaged to *Rhodes*; and if so, the freehold in question, containing twenty-one acres, which was not comprised in that mortgage, passed to *Pearsall* and *Andrews*, as trustees under the will. No question arises as between an heir at law and a devisee, but merely as between two devisees. This case is distinguishable from every other, as the description of the property is not expressed in the words of the devise to the trustees, but in the previous recital, and each case must depend on the terms of the will to which it may apply. The will, at its commencement, recites that the devisor was seised in fee of *divers freehold* messuages, in the parish of *St. Mary, Islington*, and also of *certain copyhold* lands, in the manor of the prebendary of *Islington*; and he gave and devised *all and every* his said freehold and copyhold lands, with their appurtenances, to *Pearsall* and *Andrews*, and their heirs, on certain trusts declared in the will. The word *divers*, in the introductory recital, imports more than one estate, and, coupled with *certain* copyhold lands, it must be inferred that the testator meant

that the whole of his freehold and copyhold property at *Islington* should pass. As to the rest, residue, and remainder, of the testator's freehold, copyhold, and leasehold estates, which he devised to his son, *Samuel Pullin*, and which might pass to him under the residuary clause, it must be taken to apply to the testator's leasehold estates at *Islington*, and *Clerkenwell*, and to the copyhold at *Edgware*. Although in the recital it is stated that *all* the testator's freehold and copyhold lands at *Islington* were subject to a mortgage to *Rhodes*, still it is mere matter of description, and not of limitation. So the word *and*, as connecting those estates with the before-mentioned freehold and copyhold, is only an additional description, but does not limit the antecedent general terms. The testator clearly meant that the trustees should be acquainted with the nature of his estates, and the extent of his interest in them; and, if he intended to give them part only of his property at *Islington*, it would have been described accordingly. The only difficulty as to the intention of the testator arises from the residuary clause; but there is personal property to which that applies; and although the words "freehold, copyhold, and leasehold," are there introduced, yet they can have no effect as to the testator's freehold and copyhold estates at *Islington*, which had been clearly devised to the trustees in the previous part of the will. In *Marshall v. Hopkins* (*a*), the testator, being seised, by the same title, of a messuage, and nineteen acres of land, including *Floodgate Meadow*, in the parish of *Mavesyn Ridware*, which parish consists of the townships, *Mavesyn Ridware*, *Blythbury*, and *Hill Ridware*; and having other property in *Hill Ridware*, and no where else; and the messuage in *Blythbury*, with two of the nineteen acres there, being in the occupation of *T. W.*, and the rest of the nineteen acres being, partly in the occupation of other tenants, and partly in his own; devised

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"all his messuage, with all lands, hereditaments, and appurtenances thereunto belonging, situate in *Blythbury*, in the parish of *M. R.*, now in the occupation of *T. W.*, except *Floodgate Meadow*:"—it was held, that the devise was not confined to lands in *Blythbury*, then occupied by *T. W.*, but extended to all the lands in *Blythbury* held under the same title with the messuage; and that the words "now in the occupation of *T. W.*" were to be transposed and applied to the messuage then occupied by *T. W.*, according to the fact, which transposition would render the whole consistent; whereas, without it, the exception of *Floodgate Meadow* was nugatory, as that never had been in the occupation of *T. W.*: and it was held to be no objection to this construction, that a residuary clause, giving all other the testator's real estate in *Mavesyn Ridware*, would have nothing to operate upon; the *Floodgate Meadow*, and the property in the township of *Hill Ridware*, being specifically devised in the same clause; and Mr. Justice *Le Blanc* there said (*a*), "Nothing is more frequent in wills than such sweeping clauses, after a specific devise of all the estates of the testator, giving all other his real estates, when he has nothing else left to dispose of." The devise of *all and every of* the devisor's said freehold and copyhold messuages, lands, and hereditaments, to the trustees, embraces all the property of which he was seised within the parish of *St. Mary, Islington*, at the time of making his will; and although the lands were previously stated in the recital as being subject to a mortgage to *Rhodes*, yet, as all the freehold and copyhold lands were afterwards expressly devised to the trustees, the addition of inaccurate particulars will not vitiate such devise. In *Roe d. Conolly v. Vernon* (*b*), it was held, that where there was a grant of a particular thing, once particularly ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false re-

(*a*) 15 East, 319.(*b*) 5 East, 51.

specting it, would not frustrate the grant. In *Blague v. Gold* (a), a devise of a house called the "corner house," was holden a sufficient description to pass the house so named, though it was further stated to be in the tenure of *Benson* and *Hitchcock*, when in fact it was in the tenure of *Benson* and one *Holt*; and Lord *Ellenborough*, in commenting on that case, in delivering the judgment of the Court in *Roe d. Conolly v. Vernon*, observed (b), that in *Cro. Car.* it was said, that the addition in tenure of *Hitchcock*, although it was not in the tenure, and was a mistake, was yet but surplusage, and, although false, should not vitiate the devise. So here, although in the previous recital in the will all the testator's lands at *Islington* were described as being mortgaged to *Rhodes*, yet it will not vitiate the devise to the trustees, as the testator meant to leave them all and every the freehold and copyhold messuages and lands at *Islington* of which he was then seised. Suppose he had stated in the recital that they were all in the occupation of *Rhodes*, it would be mere matter of description, and not of limitation. Besides, the testator directed an annuity of 20*l.* to be paid to his servant, during her life, out of the residuary personal estate, from which it must be inferred, that he intended that the whole of his real estates should pass to the trustees.

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Mr. Serjeant *Bosanquet*, *contra*.—Although in *Roe d. Conolly v. Vernon* it was held, that, where there is a grant of a particular thing once ascertained, the addition of a false or mistaken allegation will not frustrate it; yet, where a grant is in general terms, the addition of a particular circumstance will operate by way of restriction and modification of the grant; or, in other terms, that which is mere allegation, may, if consistent, operate as a restriction. Here, the testator began his will by reciting that he was

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seised in fee of divers messuages and lands, and entitled to certain copyhold lands at *Islington*, all which were subject to a mortgage made by him to *Rhodes* for securing to him the re-transfer of a certain sum in the funds lent by *Rhodes* to the testator. The terms of the mortgage, therefore, are stated with the most minute accuracy, and that clearly indicates the testator's intention that those estates *only* should pass to the trustees; and although he devised *all* and *every* his *said* freehold and copyhold messuages and lands to them, still those words must have reference, and be confined to the estates previously stated to be situate at *Islington* and in mortgage to *Rhodes*. The word *divers* cannot be considered as synonymous with *all*, and, therefore, cannot be taken to comprehend *all* the freehold messuages and lands the testator had at *Islington*, but only those mortgaged to *Rhodes*; and it must be assumed that the person who made the will had seen the mortgage securities. The words in the devise to the trustees, *viz.* "all and every my *said* freehold and copyhold messuages, lands, and hereditaments," must refer to the last antecedent, *viz.* to the lands mentioned as being mortgaged to *Rhodes*. If it were clear that it was the intention of the testator to give his trustees all his freehold estates, it must be admitted that the word *freehold*, in the residuary clause, would have no effect or operation; but he has confined the property he intended should pass to them, *viz.* the lands at *Islington* in mortgage to *Rhodes*. In *Gascoigne v. Barker* (*a*), a person gave to his son *Henry*, *all* his lands, tenements, and hereditaments, in possession and reversion, freehold and copyhold, in the parish of *Chiswick*, or elsewhere in the county of *Middlesex* (which copyhold lands the testator had surrendered to the use of his will), to him and his heirs; and Lord *Hardwicke* held, that the words in the parenthesis were to be taken as restrictive of the first

words of the devise, so that the devise should be construed only to extend to copyholds actually surrendered, and not to any others. The same point was determined in *Wilson v. Mount* (*a*). Although the case of *Banks v. Denshaw* (*b*), may be said to be in opposition to those decisions, where a testator gave *all* and every his freehold and copyhold messuages to *A.*, and *B.* (having surrendered the copyhold part thereof to his will); and he had two copyholds, one of which he had surrendered, and the other not; it was held, that both passed by it, it being clearly his intention that they should; besides, there, the testator willed that the copyhold part should be subject to the payment of 400*l.* due on a mortgage of a part thereof; and the mortgage was on the part of the copyhold which was not surrendered. But here the testator intended that, under the devise to them, the trustees should only take the estates in mortgage to *Rhodes*.

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**Lord Chief Justice Best.**—At present, I entertain no doubt whatever in this case. It is unnecessary to refer to previous decisions, as little assistance can be derived from them, except with reference to certain principles which have been from time to time laid down. The words of every will differ; and the ground on which I think that this case must be decided, is, that, on looking at the whole of the will, and giving the best possible effect to the intention of the testator, the twenty-one acres in question did not pass under the particular devise to the trustees, but that they passed to *Samuel Pullin* the younger, under the residuary clause of the will. I agree with Lord *Ellenborough* in *Roe d. Conolly v. Vernon*, that, where the previous devise is clear and precise, the property ascertained by it will pass, and that a subsequent misdescription will not affect it; but, if the terms of the devise be doubtful, that prin-

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ciple will not apply. Here, it appears to me to be clear, that the testator did not intend that the twenty-one acres should pass to the trustees, and although he has used the word *all*, still it does not refer to all his estates at *Islington*, but only to all those which were subject to a mortgage to *Rhodes*, the particulars of which mortgage he has most minutely specified, and introduced by way of description. If a man devise a particular part of his property, and shew to which he intends to refer, by describing it, as being mortgaged, or in the tenure or occupation of another, such property only will pass; but where he devises all his property generally, whether freehold or copyhold, it cannot be limited to an estate of any particular description. But here the testator has described the property in the previous part of the will; and although he has not designated it in the devise to the trustees, still there is sufficient to shew that the lands in mortgage to *Rhodes* only were to pass to them. As to the testator's having charged the annuity on his personal estate, if *Samuel Pullin*, the son, were to sell the estates devised to him, it might be inconsistent to charge them with the payment of the annuity. The testator, therefore, directed it to be paid out of the residuary *personal* estate, so as to leave the *real* untouched and undisturbed. The residuary clause would be altogether inoperative, if this construction be not put on the will; and we are bound to construe it so as to give the full effect to every part of it. I also agree with Mr. Justice *Le Blanc*, in *Marshall v. Hopkins*, that sweeping clauses are frequently introduced into wills, after a specific devise of all the testator's estates, giving all other his real estates, when he has nothing left to dispose of; but Mr. Justice *Bayley* there said, that he thought it was the testator's intention to give all that he had in *Blythbury*, under one title; and here the testator had lands at *Islington* which were not comprised in the mortgage to *Rhodes*.

Shortly after the last Term, the following certificate was sent to the Master of the Rolls.

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" We have heard this case argued by counsel, and, having considered the same, are of opinion that the said freehold lands and hereditaments, in the case mentioned, as containing twenty one acres, or thereabouts, which were not comprised in the said mortgage to the said *Samuel Rhodes*, did not pass by the said devise to the said *Benjamin Pearsall* and *William Andrews*, and their heirs; but that the same passed, by the said residuary devise and bequest, to the said *Samuel Pullin* the younger, his heirs, executors, administrators, and assigns.

W. D. BEST,  
J. A. PARK,  
J. BURROUGH,  
S. GASELER."

## BARNARD v. NEVILLE.

Saturday,  
June 4th.

THE defendant was arrested by virtue of a writ sued out upon the following affidavit to hold to bail:—

" *George Walker*, of &c., maketh oath and saith, that the defendant is justly and truly indebted to the plaintiff, in trust for this deponent, in the sum of 2,063*l.*, secured to the plaintiff by an indenture made between him and the defendant, on the 16th October, 1820, by which the defendant covenanted to pay to the plaintiff the sum of 50*l.* and the costs of executing the indenture; and also to pay to the plaintiff, his executors, administrators, and assigns, the further sum of 2000*l.*; and which said sums were to be paid to the plaintiff at certain times, and on certain events, which have now passed and happened: and that such sums have not as yet been paid."

An affidavit to hold to bail stated that "the defendant was indebted to the plaintiff in a certain sum, secured to the plaintiff by an indenture, by which the defendant covenanted to pay certain specified sums, at certain times, and on certain events, which had passed and happened, and that such sums had not been paid:" Held sufficient.

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Mr. Serjeant *Pell* moved for a rule, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Sheriff of *Middlesex*, on entering a common appearance. He contended, that this affidavit was not sufficiently explicit or certain, as it should have disclosed the nature of the debt, and the manner of its becoming due from the defendant to the plaintiff; that it was not so framed as that perjury might be assigned on it; and that, for any thing that appeared on the face of it, the debt might have been founded upon a consideration which was altogether illegal and void. In *Bosanquet v. Fillis* (a), an affidavit that the defendant was indebted to the plaintiff in the sum of 600*l.*, upon a bond made and entered into by the defendant to the plaintiff, in the penal sum of 25,000*l.*, without shewing the condition of the bond, was held to be insufficient; and Mr. Justice *Le Blanc* said:—"Consistently with this affidavit, it might be a bond for securing the performance of covenants and agreements, upon which the plaintiff could not hold the defendant to bail, without stating breaches, and how much he is damned." So here, the nature of the covenant or agreement between the parties, should have been stated on the face of the affidavit.

Lord Chief Justice *Best*.—I think the affidavit is sufficiently explicit and certain. It alleges an indenture under which certain sums were to be paid by the defendant to the plaintiff, "at certain times, and on certain events, which have now passed and happened." If this were false, an indictment for perjury would certainly lie against the party who made it. The case of *Bosanquet v. Fillis* is distinguishable, as there the affidavit contained nothing to shew how the debt became due; and Lord *Ellenborough* said: "*non constat* but that the bond might be conditioned for

the performance of covenants;<sup>a</sup> in which case there might be nothing due. Here, however, the affidavit expressly states, that a debt *is due*. As to the consideration, if illegal, it may be shewn at a future time; but we cannot decide that point on motion.

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**Mr. Justice PARK.**—In an affidavit to hold to bail on a bill of exchange or promissory note, it is enough to state that it was payable at a day past. The consideration in such a case is never shewn; and there is no reason for requiring it here.

**Mr. Justice BURROUGH.**—If we were to hold it necessary to set out the consideration in an affidavit of debt, it might frequently have the effect of making such affidavit of equal length with the declaration.

Rule refused.

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#### HADWEN v. MENDIZABEL.

*Saturday,  
June 4th.*

**T**HIS was an action of *assumpsit*, for goods sold and delivered.—At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the sittings after the last Term, it appeared that the plaintiff and defendant were merchants, the latter residing in *Spain*. For the plaintiff, a witness was called, to prove admissions made by the defendant, at *Seville*, as to the purchase of the goods, and that a balance was due from him to the plaintiff, who stated, on cross-examination, that the defendant gave the plaintiff, in payment for them, five bills of exchange, one of which had been paid, as was also part of another; but that the other three were dishonored, and were afterwards transferred by the plaintiff to one *Butler*, who gave his acceptances for their amount; that *Butler* afterwards became bankrupt; and that the plaintiff had only received a dividend on one of his accept-

The defendant having given the plaintiff, in payment for goods, certain bills of exchange, which were afterwards dishonoured, the latter sued him for the price of the goods:—Held, that the plaintiff was not bound to produce the bills at the trial; and that the fact of their being in the possession of his agent at the time, did not bar his right of recovery.

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ances from his estate; and that three years since the defendant made out an account at *Seville*; and that the original bills given for the payment of the goods were still in existence, and were in the hands of an agent of the plaintiff. On this evidence it was submitted, for the defendant, that the plaintiff could not recover without producing the bills, as they might be then outstanding in the hands of a *bond fide* holder, to whom the defendant would be again liable for their amount. His Lordship, however, thought that the plaintiff was entitled to recover for the original consideration, and that it was not necessary that he should produce the bills. The Jury accordingly returned a verdict for the plaintiff,—damages £,200*L.*, being the amount remaining due for the goods supplied.

Mr. Serjeant *Pell* now applied for a rule, calling on the plaintiff to shew cause why that verdict should not be set aside and a new trial granted, on the ground, that, if the bills were in circulation, the defendant would be liable to be arrested on them, notwithstanding the plaintiff had recovered in this action. He referred to the case of *Dangerfield v. Wilby* (*a*), where the declaration contained a count upon a promissory note made by the defendant, payable to the plaintiff, and the money counts; and at the trial, the note was stated to have been lost, though no evidence was offered of that fact; but it was proved that, on the money being demanded, the defendant had apologised for not having paid the money *on account of the note*; it was contended, for the plaintiff, that the note was only evidence of the consideration (which was stated to have been money lent), and that he might abandon the note and go for the consideration. But Lord *Ellenborough* said, that, as the note, for any thing that appeared in evidence, was in existence, it might still be in circulation, and the defendant be liable to be called upon to pay it; so that he

(*a*) 4 Esp. Rep. 159.

might be subjected twice to the payment of the same demand; and that, without proving the note to have been lost, the plaintiff was not entitled to recover. Although in that case the plaintiff declared on the note, yet the principle laid down by Lord *Ellenborough*, is most correct and directly applicable, and there must, consequently, be a new trial.

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**Lord Chief Justice BEST.** — It was proved at the trial that the original bills were in the possession of the plaintiff's agent, and I thought that he had a right to retain them until the defendant was ready to pay. In *Dangerfield v. Wilby*, the plaintiff declared on the note, which might have been in existence, and in the hands of a third person, as its absence was not accounted for. The present case, however, is wholly different. The action was not brought on the bills. If it had been, no doubt they must have been produced. The plaintiff, however, relied on his original demand, and declared for goods sold and delivered, the consideration for which the bills were given; and he thereby threw the *onus* of setting up the bills on the defendant.

**Mr. Justice PARK, and Mr. Justice BURROUGH,** concurred.

**Mr. Justice GASELEE.** — It is quite clear, that, under the circumstances, the plaintiff was entitled to declare for the goods sold and delivered to the defendant, the consideration for which the bills were originally given, without introducing counts on the bills. The defendant may pay the amount of the verdict into Court, and move that execution may be stayed until the bills are delivered up; but it appears to me, that there is no ground to set aside the verdict of the Jury.

Rule refused.

1825.

*Tuesday,  
June 7th.*

In an action of trespass, by a bankrupt against his assignees, it appeared that the plaintiff, whilst a prisoner in the *King's Bench*, broke the rules by remaining a night at his house, when he caused his shop to be shut at an earlier hour than usual, and was denied to the clerk of a creditor. This was the only act of bankruptcy to support the commission. It was left to the Jury to say, whether the shutting up the shop at an earlier hour than usual was not with a view to enable the plaintiff the better to cause himself to be denied to his creditors. The Jury having found a verdict for the assignees.—The Court refused to grant a new trial, which was moved for on the ground, that it should have been left to the Jury to say, whether the plaintiff being concealed at home for the night, the denial was not made in fear of a discovery, rather than for the purpose of avoiding a creditor.

**HUGHES v. GILMAN and Others.**

THIS was an action of trespass brought by the plaintiff, a bankrupt, against his assignees, for seizing and taking his goods.—At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the sittings after the last Term, the only question was, whether the plaintiff had committed an act of bankruptcy on the 1st *February*, 1825, which was the only act on which the commission could rest. It appeared, that before and on that day the plaintiff was confined for debt within the prison of the *King's Bench*; that, on the morning of that day he obtained a day-rule, and went to his house on *Ludgate Hill*, where he remained all night; that he caused his shop to be closed much earlier than usual; and that, being within, he was denied to the clerk of a creditor who called at the house and desired to see him. His Lordship left it to the Jury to say, whether the shutting up the shop at an earlier hour than usual, was not done with a view to enable the plaintiff the better to cause himself to be denied to his creditors. The Jury found in the affirmative, and returned a verdict for the defendants.

Mr. Serjeant *Pell* now moved for a rule, calling on the defendants to shew cause why that verdict should not be set aside and a new trial granted, on the ground of misdirection. He submitted that, under the circumstances, the denial of the plaintiff to the clerk who called to see him, did not amount to an act of bankruptcy; that it did not appear that he called for money; that the Jury had, in fact, found that the plaintiff had committed an act of bankruptcy by beginning to keep house on that day; and, that, as in all probability the sole object of his having

been then denied, was his apprehension of being detected in an infringement of the rules of the prison, it should have been left to them to say, whether, he being concealed at home for the night, the denial was not made in fear of a discovery, rather than for the purpose of avoiding a creditor.

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**Lord Chief Justice BEST.**—The plaintiff was improperly out of the rules at the time of the denial. He had caused his shop to be shut up at a much earlier hour than usual. It appeared that he had reason to expect a visit from a creditor, for he had purchased goods two days before the day in question, for part of which he paid, and he promised to give a good bill for the remainder, but, before enquiry could be made as to the characters of the parties to the bill, he disposed of the goods to an auctioneer. There was no doubt but that the clerk called for money, and it was proved that the plaintiff heard his voice. If the hour had been late, and the plaintiff had retired to rest, it would not have amounted to an act of bankruptcy; but, as the time at which the clerk called was not unseasonable, the plaintiff, by causing himself to be denied, clearly committed an act of bankruptcy; and the fact of his being concealed at home for the night, and denying himself through fear of a discovery of his having broken the rules, affords no answer; particularly as he had caused his shop to be shut at an earlier hour than usual, for the express purpose of concealment.

**Mr. Justice PARK.**—I see no ground to induce the Court to interfere. Although it has been said, that the clerk who called at the plaintiff's house, merely asked to see him, still there can be no doubt, but that the object of his visit was to obtain money. The plaintiff obtained goods two days before the evening in question, and disposed of them to an auctioneer without having paid for them. This

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was clearly a swindling transaction ; besides which, he had violated the rules of the *King's Bench* prison, and I think it was most properly left to the Jury to say, whether his causing his shop to be shut up at an earlier hour than usual was not done for the purpose of evading his creditors ; and it would be too much for us to say, that a party is to be excused of one crime by committing another.

**Mr. Justice BURROUGH.**—The Jury have virtually found, not that the plaintiff denied himself in fear of a discovery of having infringed the rules of the prison, but, that he caused himself to be denied to a clerk of a creditor who called and requested to see him ; and it must be presumed, that he shut up his shop at an earlier hour than usual for that purpose.

**Mr. Justice GASELEE concurring—**

Rule refused.

Tuesday,  
 June 7th.

If a wife leave the house of her husband under what a Jury shall esteem a reasonable apprehension of personal violence, the husband is liable for necessaries subsequently furnished to her.

#### HOULISTON v. SMYTH.

THIS was an action of *assumpsit*, to recover from the defendant the sum of 17*l.* for board, lodging, and necessaries, furnished by the plaintiff to the defendant's wife, from the 18th *May* to the 13th *July*, 1824. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, it appeared that the marriage between the defendant and his wife took place in the year 1822 ; that they shortly afterwards separated ; that the defendant, in *August*, 1823, under the sanction of the opinion of a young medical practitioner, caused his wife to be confined in a private mad-house, from whence she was afterwards released, on being brought before Mr. Justice *Richardson* under a *habeas corpus*, when

she returned to her husband; and that, after her return, the defendant treated her with great personal violence, having put himself in a threatening attitude, and clenched his fist at her, and threatened to send her again to a place of confinement. In consequence of this treatment she left him, and was supplied with necessaries by the plaintiff.

For the defendant, evidence was adduced to shew that he had commenced a suit in the Ecclesiastical Court for a divorce, in *February*, 1824, by reason of the adultery of his wife, in which suit that Court had, in *December* in that year, decreed the wife alimony, to commence from the return of the citation, *viz.*, from the 8th of *May* preceding. His Lordship, however, thought, that that afforded no answer to the action, the plaintiff's claim having accrued before the alimony was decreed, and after the defendant had received his wife again, notwithstanding her alleged adultery; and he left it to the Jury to say, whether she had left her husband's house under an apprehension of personal violence; and he said, that, if she had reasonable grounds to fear such violence, the plaintiff would be entitled to recover. The Jury accordingly found a verdict for him, damages 17*l.*, the amount of the articles supplied.

Mr. Serjeant *Vaughan* now moved for a rule, calling on the plaintiff to shew cause why that verdict should not be set aside, and a new trial granted, on the ground of a misdirection by his Lordship to the Jury. He submitted, that no case had ever gone the length of deciding, that the mere apprehension of personal violence would justify a wife in leaving the house of her husband, or entitle a person who afterwards gave her credit to recover against the husband. He referred to the case of *Horwood v. Heffer* (*a*), to shew that no ill treatment by the husband, short of personal violence, or such as to induce a reasonable

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fear of it, will enable a stranger to maintain an action against him for necessaries furnished to the wife subsequently to her leaving his house. In that case Sir *James Mansfield* said, "Nothing short of actual terror and violence will support this action:" And Mr. Justice *Lawrence* said, "The principal circumstance dwelt on at the trial was, that the husband had placed a profligate woman at the head of his table, and having told the wife that if she did not like to dine there, she might dine in her own chamber; and, however improper that conduct might be, and however abhorrent from the feelings of a delicate woman, she might nevertheless have had necessaries, if she had staid there." If the mere apprehension of ill treatment were to be held sufficient to authorize the departure of a wife from the house of her husband, a woman might absent herself without any just or probable cause of complaint. Here, as the wife had been guilty of adultery, and had left her husband's house without any probable cause, the credit given to her could not be charged upon him; and it should have been left to the Jury to say, whether or not she had reasonable ground for departing from her husband's protection, so as to enable the plaintiff to maintain the action. Besides, the Ecclesiastical Court decreed alimony to the wife from a time anterior to that during which the credit was given to her by the plaintiff, *viz.* from the 8th *May*, 1824; and although the decree was not made until afterwards, yet it had a retrospective operation, so as to render the proceedings operative from the return of the citation.

**Lord Chief Justice BEST.**—It appears to me, that there is no pretence for this motion. I say nothing of the facts, as the only ground upon which a new trial could be moved for (the verdict being under 20*L*), was a supposed misdirection by me to the Jury. I told them, that, if they thought the defendant's wife had reasonable ground to

suspect or apprehend that her husband would use personal violence towards her, she was justified in leaving his house; and that the plaintiff, who had received her, and supplied her with necessaries, was entitled to compensation from the defendant. The opinion I entertained at the trial is not changed; and although the case of *Horwood v. Heffer* seems to have gone much further than any other decision, even that case warrants my opinion; for Mr. Justice *Lawrence* there observed to me, when I moved for a new trial, " You did not state any apprehension of her (the wife's) personal safety;" from whence it may be reasonably inferred, that, if there had been any evidence that the wife had reasonable cause to expect personal violence, that learned Judge's opinion would have been different. A threat of personal violence is sufficient. A woman is not bound to wait until actual violence or cruelty has been committed; but she may, if there be reasonable ground for apprehension, avoid it, by withdrawing herself. At the trial, I told the Jury that the question was, whether the facts disclosed in this case were such as might reasonably induce a woman of sound mind to apprehend personal violence, or such only as might intimidate a fanciful woman. There was abundant evidence to shew that the fears of the wife were well founded, as the defendant had not only used threats, but actual violence. It was for the Jury to decide, whether or not she were warranted in leaving him; and no man could doubt but that she had reason to expect from her husband, a repetition of the cruel treatment which she had previously experienced. Although this case may fall within the principle laid down in *Horwood v. Heffer*, still I cannot subscribe to the language there attributed to the Court; but the authority of that case appears to me to be impugned by Lord *Ellenborough* in *Aldis v. Chapman*(a), where his Lordship held, that, if a husband, by

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(a) Sel. Ni. Pri. 3d Edit. 249.

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bringing another woman under his roof, render his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessaries during the separation; and in *Hodges v. Hodges* (6), Lord Kenyon said, that, where a wife's situation in her husband's house is rendered unsafe, from his cruelty or ill-treatment, he should rule it to be equivalent to a turning her out of the house, and that the husband should be liable for necessaries furnished to her under those circumstances. Although these are only decisions at *Nisi Prius*, still they appear to be more consonant to reason, to justice, and to humanity, than the case of *Horwood v. Heffer*; and I cannot persuade myself to believe, that Mr. Justice Lawrence could have used the language there imputed to him; for it must be presumed that the defendant's wife in that case was a virtuous woman, and she did right in not submitting to sit at the same table with a prostitute, placed there for the purpose of insulting her. Indeed, if she had remained in her husband's house after such treatment, she might have been deemed to have connived at his conduct, and thus might have prejudiced her case in another place, if she had instituted a suit against him for adultery. She, therefore, was perfectly justified in leaving him, and seeking protection elsewhere. The law of this country is founded upon religion, morality, and common sense, and will not countenance the violation of either; and it would be too much to say, that a married woman can be compelled to remain under the roof of her husband, the house being contaminated with the presence of a prostitute. But as it appears that the defendant actually used personal violence towards his wife, this case goes beyond that of *Horwood v. Heffer*. As to the alleged adultery of the wife, that can afford no answer to the action; for, in order to ren-

der the misconduct of the wife a defence for the husband in a case of this description, he should shew that he repudiated her at the time he first made the discovery; and if he receive her again under his roof, he forfeits all title to urge such a defence. With regard to the objection as to the allowance of alimony having relation to a time anterior to the giving of the credit by the plaintiff, I think it altogether futile; for, if the husband were not to be liable for necessaries furnished to his wife before the *actual* allowance of alimony, (which was not decreed until some months after), she would have been left without any means of obtaining support, which cannot be for a moment entertained. It was left to the Jury at the trial to say, whether they thought the wife had reasonable ground to apprehend personal violence. They found that she had. The evidence fully warranted their finding; for it was proved that the defendant had not only held his fist in her face, but had threatened to send her to a place of confinement; and, he having before sent her to a private mad-house, she had every reason to fear that she might be sent there again.

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Mr. Justice PARK.—I am of the same opinion. There appears to me to be no colour for us to interfere to disturb this verdict; and as the damages were under 20*l.*, the application must rest on the sole ground of a misdirection by my Lord Chief Justice to the Jury. It is quite clear, that, on the facts, there is no ground for a new trial. It seems to me, that the Jury were most properly directed; for the true question was, whether the defendant's conduct to his wife were such as to induce her to apprehend personal violence. From what had taken place before, she had strong grounds to fear a repetition of violence. It has been said, that this case must be governed by that of *Horwood v. Heffer*. I do not recollect to have seen that case before it was cited at the

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bar; and although, in the abstract, it may not be impugned, still I confess I am surprised at the language there attributed to Mr. Justice *Lawrence*, because it is repugnant to the feelings of a man, either as a moralist or a Christian. He is there reported to have said, "that the principal circumstance dwelt on at the trial was, that the husband had placed a profligate woman at the head of his table, and told the wife, that, if she did not like to dine there, she might have dinner in her own chamber." What! is a wife, or mistress of a family, to be turned from her husband's table, to give way to a common prostitute? That learned Judge is further reported to have said, "that, however improper that conduct might be; and however abhorrent from the feelings of a delicate woman, she might, nevertheless, have had necessaries, if she had staid there." I confess, I cannot believe that he used such language. It is not only contrary to the laws of *England*, but repugnant to morality and religion; and I would much rather subscribe to the doctrine laid down by Lord *Kenyon*, in *Hodges v. Hodgea*, that, where a wife's situation in her husband's house is rendered unsafe, from his cruelty or ill-treatment, it is equivalent to turning her out of the house.

Mr. Justice *BURROUGH*.—It is unnecessary for us to impugn the authority of *Horwood v. Heffer*, as here the only question is, whether, from the evidence before them, the Jury might not presume that the defendant's wife had reasonable ground to apprehend personal violence from him, at the time she quitted his house. It appeared that he had before sent her to a private mad-house, and threatened to confine her again; and not only that, but that he had actually placed himself in a menacing attitude, and clenched his fist at her. Under these circumstances, I am of opinion, that the question was most properly left to the Jury, and that they have drawn a right conclusion.

**Mr. Justice GASELEE.**—It is not necessary for us now to enquire what species of personal violence will justify a wife in leaving the house of her husband. It is impossible to doubt that the threat of sending her to a mad-house, and confining her there, without reasonable cause, is of itself sufficient; and here it was proved, not only that the defendant had before sent his wife there, but that he threatened to confine her again. This alone must have placed her in a dreadful situation; and it was for the Jury to say, whether she had not a reasonable cause for apprehension; and, they having so found, there appears to me to be no ground to disturb this verdict. If the question had not been left to them as it was, the defendant might have had more reason to complain. With respect to the case of *Horwood v. Heffer*, I abstain from giving any opinion upon it. I own I am rather surprised at the language there attributed to the Court, and have always considered the law on this subject to be as laid down by Lord *Kenyon* in *Hodges v. Hodges*, that if a man, from cruelty or ill-treatment, render his house unfit for the residence of his wife, it is equivalent to turning her out of the house; and that he is bound to pay for necessaries furnished to her under those circumstances.

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Rule refused.

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**ABBOTT v. RICE.**

*Tuesday,*  
*June 7th.*

THIS was an action of replevin.—The plaintiff was the occupier of a farm that had been mortgaged to the defendant. There was a second mortgage of the same property, and the defendant was appointed receiver of the rents. A person of the name of *Mills*, who claimed under the second mortgage, caused the authority of the de-

An attorney, without being duly authorized by the tenant, commenced an action of replevin in his name against his landlord, and the tenant allowed the cause to be

tried, and, having obtained a verdict, caused satisfaction to be entered on the record, the attorney's costs not being secured or paid:—The Court refused to vacate the entry, although the attorney insisted that it was made, through the collusion of the plaintiff and defendant, in order to deprive him of his costs.

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fendant, as receiver, to be revoked, promised to pay him the amount of his claim on the estate, and gave the plaintiff, the tenant, notice to pay the rent to him, *Mills*. The defendant's claim not having been discharged by *Mills*, he, having for some time before received the rent as it became due, distrained for old arrears. *Mills* and his attorney induced the plaintiff to sign a replevin-bond, which they executed as his sureties, and, promising to indemnify the plaintiff, commenced this action in his name. The defendant, finding that the plaintiff, at the time of signing the replevin-bond, was ignorant of its nature, and had no intention of prosecuting a replevin suit, obtained a Judge's order to transfer the papers in the action from *Mills*'s attorney to the plaintiff's attorney, upon the former being paid his costs up to that time. The costs were not paid, and the order was rescinded; and *Mills*'s attorney, having received no further notice from the plaintiff, proceeded to try the cause. At the trial, before Lord Chief Justice *Abbott*, at the last *Spring Assizes* for the county of *Norfolk*, the defendant gave in evidence an admission by the plaintiff, signed on the morning of the trial, that he held the premises in question as tenant to the defendant, and his Lordship left it to the Jury to say, whether or not this admission had been executed fraudulently, and with a view of depriving *Mills*'s attorney of his costs. — They found a verdict for the plaintiff, who afterwards, and without any communication with *Mills*'s attorney, caused an entry of satisfaction to be made on the judgment-roll.

Mr. Serjeant *Wilde*, in the last Term, on the part of *Mills*'s attorney, obtained a rule to shew cause why this entry should not be vacated, and why the defendant should not pay *Mills*'s attorney his costs, as well of the action as of the application, on the ground that the plaintiff and the defendant had concerted together to pre-

vent him (the attorney) from obtaining his costs. The application being made on behalf of the attorney alone, the Court directed that the plaintiff should be made a party, and the rule was for that purpose enlarged until this Term.

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Mr. Serjeant Spankie now shewed cause, on an affidavit of the plaintiff, in which he denied that he had ever given *Mills's* attorney any authority to commence or prosecute the replevin suit; that he, as well as *Mills*, had refused to give him the indemnity promised when the bond was executed; and that, consequently, the plaintiff and defendant had, without fraud or collusion, taken steps to end the cause as soon as possible.—The plaintiff also swore, that he never intended to dispute the defendant's title, and that he told the agent of *Mills's* attorney that the proceedings were carried on against his sanction or wish. Under these circumstances, the learned Serjeant submitted that the application was totally groundless, it being made entirely on behalf of *Mills's* attorney, who had improperly thrust himself into the cause, he having no authority whatever from the plaintiff to prosecute the action; and that, as the Court had a right to exercise an equitable jurisdiction over their officers, they would not, at all events, afford the attorney any relief, unless he clearly shewed that he was fully authorized by the plaintiff in replevin to carry on the suit in his name.

Mr. Serjeant Wilde, in support of the rule. It is manifest that the suit has been sanctioned by the plaintiff, he never having interfered to prevent the cause going down to trial, although it appeared that he was perfectly aware of the steps that had been taken by *Mills's* attorney. This case, therefore, falls within the principle of *Payne v. Rogers* (a), where a person who was sued by

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a landlord in the name of his tenant, procured a release from the nominal plaintiff, and the Court ordered the release to be delivered up, and permitted the landlord to proceed; and of *Hickey v. Burt* (a), where a lessor, with the permission of a bailiff who had made a distress for rent, commenced, in the bailiff's name, an action against the sheriff for taking insufficient pledges, and the bailiff afterwards, without the privity or consent of the lessor, released to the sheriff; the Court set aside the release, as also a plea thereof pleaded *puis darrein continuance*; and here, as satisfaction was entered on the record through the collusion of the plaintiff and defendant, the Court will not allow *Mills's* attorney to be deprived of the costs to which he is justly entitled.

Lord Chief Justice BEST.—The case of *Payne v. Rogers* has gone much further than any preceding decision. But I am of opinion, that this application cannot be granted; for, should the entry of satisfaction be vacated, and execution issue against the defendant, what could prevent the plaintiff from discharging the goods in the hands of the sheriff? Could we issue an attachment against him for so doing? I think we could not; and, consequently, that there is no ground for us to interfere. But the main ground on which I rely is this, that, if an attorney use the name of a tenant, in a replevin-suit against his landlord, he ought to shew, not only that the plaintiff knew distinctly the nature of the proceedings, but that they were duly authorized by him; for, if he do not shew this, it is but fair to presume that he had no authority, and that he acted improperly. Here, *Mills's* attorney should have seen that the plaintiff (the tenant) was indemnified from the consequence of his name being used, and should have required from him an undertaking in writing not to release the action, in which case he might have been sued if he

violated his engagement. At all events, the attorney should have distinctly shewn to the Court that every thing had been rightly done, before he called on us to interfere in a summary way to relieve him. That has not been done. As, however, all the parties appear to have been in some degree culpable, the rule must be—

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Discharged without costs.

Doe, on the demise of WILLIAMSON, *v. Roe.*

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MR. Serjeant *Wilde* moved for judgment against the casual ejector.—It appeared that the action had been brought to recover the possession of premises in the occupation of two joint-tenants, only one of whom had been served with a copy of a declaration. This the learned Serjeant submitted was sufficient, on the authority of *Doe d. Bailey v. Roe* (*a*), where this Court held, that service of a declaration on one of two tenants in possession, was good service on both.

Service of a declaration in ejection, on one of two joint tenants, is good service; but, if the notice to appear be addressed to one only, by name, it is irregular, and will not entitle the lessor of the plaintiff to move for judgment against the casual ejector.

But, on Mr. Secondary *Hewlett's* observing, that, in this case, the notice to appear was addressed to one of the tenants only, the Court refused the application, and said, that the notice should have been addressed to both the tenants by name; but admitted, that service of the declaration on one, would, in the case of a joint-tenancy, be good service on both.

The learned Serjeant therefore took nothing by his motion (*b*).

(*a*) 1 Bos. & Pul, 369. (*b*) See *Doe d. Elwood v. Roe*, 3 B. Moore, 578.

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Trespass may be maintained for taking away a tomb-stone from a church-yard, and obliterating an inscription made upon it, at the suit of the party by whom it is erected, although the freehold of the church-yard is in the parson; as the right to a tomb-stone vests in the person who erects it, or in the heirs of the deceased, in whose memory it is set up.

## SPOONER v. BREWSTER.

THIS was an action of trespass.—The plaintiff declared that the defendant, with force and arms, &c., seized, cut, damaged, and destroyed, divers tomb-stones and grave-stones of the plaintiff; and with divers saws, chisels, and other instruments, cut out and erased therefrom divers inscriptions, letters, and figures, of the plaintiff, upon the said tomb-stones and grave-stones inscribed and engraved; and took and carried away the said stones, and converted and disposed thereof to the defendant's own use.—Plea, Not Guilty.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the adjourned Sittings after the last Term, it appeared, that, in 1815, a person of the name of *Gravenor* had married the plaintiff's daughter. That the plaintiff had been previously convicted of fraudulently purchasing government stores, received sentence of transportation to *New South Wales* for seven years, and was transported accordingly. That, in 1816, the plaintiff's daughter, *Mrs. Gravenor*, died, when the plaintiff's wife (he being still under sentence abroad) paid for a tomb-stone, which she caused to be erected and placed at the head of her daughter's grave, in *Bethnal-Green* church-yard, bearing the inscription, "Sacred to the memory of *Elizabth Gravenor*"; and a short time afterwards she caused to be engraved on the back of the stone, the words, "The family grave of *John and Sarah Spooner*." It also appeared, that *Gravenor* paid for the grave where his wife was buried, and, in *January* last, claimed the tomb-stone, and directed the defendant, a stone-mason, to remove it, and obliterate the words on the back; and that the defendant accordingly took it up, and removed it to his workshop for that purpose. The plaintiff, having returned to this country, previously to the removal, was requested by *Gravenor* to have the words on the back of

the stone taken out, which he refused, and told the defendant not to remove the stone as it was his property, and after the removal he gave him notice not to alter it. The defendant at first promised that he would not, but about a week afterwards, he said he was indemnified by *Gravenor*, and cut out the words at the back of the stone.—For the defendant, it was objected, that trespass would not lie, as the freehold of the church-yard was in the parson; and that the plaintiff's remedy, if any, was by an action on the case. His Lordship, however, was inclined to think that the action was well brought; and told the Jury, that, although the freehold of the church-yard was in the clergyman, yet that the tomb-stones set up therein were the property of those who erected them; and that, as the trespass complained of was not upon the soil, but done to the tomb-stone, the plaintiff was entitled to recover. The Jury, accordingly, found a verdict for the plaintiff, damages 5*l.*; leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that trespass could not be maintained.

Mr. Serjeant *Wilde*, on a former day in this Term, moved accordingly, and relied on the case of *Smith v. Miles* (*a*), to shew, that, in order to entitle a person to bring trespass, he must, at the time when the act which constitutes the trespass was done, either have in him the *actual possession* of the thing which is the object of the trespass, or a *constructive possession*, in respect of the right being actually vested in him. In *Comyns's Digest* (*b*), it is said, that the soil and freehold of the church and church-yard belong to the parson; that he may make a lease of them, and shall have the trees growing in the church-yard for the repair of the church; and *Rolle's Abridgment* (*c*), is

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(*a*) 1 Term Rep. 480.

(*b*) Tit. "Esglise," G. 1.

(*c*) Vol. 2, 337.

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referred to in support of that position. In *Corven's case* (*a*), it was held, that coats of arms hung up in a church in honour of an ancestor, are in the nature of heir-looms, which, by the common law, belong to the heir, as being the principal of the family; and that the like law is applicable to a grave-stone, tomb, and the like. It is, therefore, quite clear that this action cannot be maintained. In *Garven v. Pym* (*b*), the *Year-Book*, 9 Edw. 4, 14, *Dame Witche's* case, was cited, where she brought an action of *trespass* against the parson for taking away her husband's coat-armour, which was fixed to the church at his funeral; and it was adjudged, that the action would lie; and so would an action in such case, brought by the heir; but, on reference to the *Year-Book*, it does not appear what the form of action was. In *Frances v. Ley* (*c*), it was resolved, that coats of arms placed in any window, or monument, in the church or church-yard, cannot be beaten down or defaced by the parson, ordinary, churchwardens, or any other; and if they be, the heir by descent, interested in the coat, &c., may have an *action upon the case*, and Sir William *Witche's* case, 9 Edw. 4, 14., was cited to that purport.

[Lord Chief Justice *Best*.—In *Dawtrie v. Dee* (*d*), Lord Chief Justice *Mountague*, and Mr. Justice *Haughton*, held, that, if one claim to have a seat in a church, he may maintain an action of *trespass* for breaking it, and 8 Hen. 7, is referred to as an authority for that position; but that, if he claim liberty only to sit there, he shall have an action on the case.]

That case cannot now be considered as an authority. It is quite clear that the freehold of the church-yard is in the parson, and the case of *Frances v. Ley* is expressly in point, to shew that a monument or tomb-stone in a

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| ( <i>a</i> ) 12 Rep. 105; S. C., <i>nomine</i> | ( <i>c</i> ) Cro. Jac. 366.            |
| <i>Garven v. Pym</i> , Godbolt, 199.           | ( <i>d</i> ) 2 Rolle's Rep. 140; S. C. |
| ( <i>b</i> ) Godbolt, 200.                     | Palmer, 46.                            |

church or church-yard is annexed to the freehold, and that if they be defaced by the parson, or any other person, the heir by descent has his remedy by action. Besides, a tomb-stone may be considered as annexed to the freehold; whilst a coat of arms, or a helmet, are in the nature of moveables. If, therefore, an actual or a constructive possession be necessary, in order to enable a party to maintain trespass, as the right of possession in this case is in the parson, he alone could maintain trespass for taking away or defacing the stone. The declaration charges the defendant with having seized, cut, and damaged, the plaintiff's tomb-stone, and defaced and carried it away, and if that were one continuous act, the constructive possession was still in the parson, the right to the tomb-stone being vested in him at the time of the removal; and although the obliteration was not made till afterwards, the property in the stone did not revert to the plaintiff. The taking it up, the removal, and the obliteration, constituted one continuous act; and if it had been charged to have been taken feloniously, and the taking down the stone were followed *immediately* by the carrying it away, the plaintiff would have no remedy against the defendant by indictment, as he had no right to the property taken. If a tree be cut down and carried away, it cannot be deemed a chattel, so as to render the taking of it felonious, unless some interval elapse between the severance and removal; and, although the heir in this case might have an action on the case, yet it does not appear that, in the case of a removal, the property in the tomb-stone would revert to him: it still continued in the parson. The stealing a dead body is not a felony, as a corpse is *nullius in bonis*; but the stealing the shroud is felony, as the property in it remains in the executor, or whoever was at the charge of the funeral. But not so a tomb-stone, which becomes part of the freehold of the church-yard, and is

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vested in the parson. In *Clifford v. Wicks* (*a*), it was held, that a grantee of part of the chancel of a church by a lay impropriator, or those claiming under him, cannot maintain trespass for pulling down his or their pews there erected. When a monument, or tomb-stone, is once annexed to the freehold, it cannot be severed from it by the person who caused it to be placed there; and, as the fee of the church-yard is in the parson, this action cannot be supported. The plaintiff's remedy, if any, was by an action on the case. In *Garven v. Pym*, Lord Chief Justice Cook said (*b*), that, if a man, with the assent of the ordinary, set up a seat *in nave ecclesiae* for himself, and another man pull up the same, or defaceth it, trespass *ei et armis* will not lie against him, because the freehold is in the parson, and he hath no remedy for the same, but to sue the party in the Ecclesiastical Court; and he said, that he had seen a judgment in 6 *Edw.* 6, that if executors lay a grave-stone upon the testator in the church, or set up his coat-armour in the church, if the parson or vicar doth remove them, or carry them away, that they, or the heir, may have their action upon the case against the parson or vicar; and in *Cowyns's Digest* (*c*), the case of *Garven v. Pym*, is referred to as an authority to shew, that, if a parson, &c. remove a grave-stone or coat-armour of one deceased, out of the church, an action upon the case for a malicious misfeasance lies against him.

The Court took time to consider, whether they should grant a rule or not, and—

Lord Chief Justice BEST now gave his opinion as follows:—This was an action of trespass, for removing and erasing an inscription from a tomb-stone; and it was ob-

(*a*) 1 Barn. & Ald. 498.

(*b*) Godbolt, 200.

(*c*) Tit. "Action upon the Case for Misfeasance," A. 6.

jected at *Nisi Prius*, and again on the motion for a new trial, that trespass could not be maintained, but that the plaintiff's remedy, if any, was by an action on the case. I entertained no doubt at the trial but that some species of action was maintainable; and I have since found the following authority in *Coke Littleton*, which appears to me sufficient to shew that my opinion was well founded. Lord Coke says (a), "if a nobleman, knight, esquire, &c. be buried in a church, and have his coat-armour and pennons, with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church, or if a grave-stone or tomb be laid or made for a monument of him, in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heir and his heirs in the honour and memory of whose ancestor they were set up; and some hold, that the wife or executors that first set them up may have an action in that case against those that deface them in their time." That passage is directly in point to shew that the heir may bring an action; but it does not state what form of action was to be adopted, or whether the remedy was by trespass or case. It is most material, that the proper form of action should be strictly attended to, and, upon full consideration, we are all of opinion that the present form of action is right; and the case of *Dawrie v. Dee*, as reported in *Rolle*, appears to be expressly in point, where Lord Chief Justice *Mountague* and Mr. Justice *Haughton* took the distinction, and held, that, if one claim to have a seat in a church, he may maintain trespass for breaking it; but where he claims liberty only to sit there, he shall have an action on the case. Although, in *Stocks v. Booth*, Mr. Justice *Buller* said (b), "trespass will not lie for entering into a pew;" still he assigned a reason, viz. that the plaintiff

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v.  
BREWSTER.

(a) Co. Lit. 18 b.

(b) 1 Term Rep. 430.

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had not the exclusive possession, the possession of the church being in the parson. But another reason why trespass will not lie for removing a person from a pew, is, that seats in a church are in the disposition of the ordinary of the diocese, who may put in one person, and then remove him, and put in another, for the convenience of the parish; unless there be a faculty. But the distinction in *Dawtrie v. Dee* appears to me to be founded in good sense, and consistent with law and reason; and though it may once have been doubted, it is consistent with other decisions. Although in *Frances v. Ley* it is stated to have been resolved that a monument in the church or church-yard cannot be beaten down or defaced by the parson, ordinary, or others; and, if it be, that the heir by descent may have an action upon the case, as 9 *Edu.* 4, 14: yet, on reference to the *Year Book*, it does not appear what the form of the action there was. But in *Garven v. Pym*, the authority alluded to was cited as *Dame Wiche's* case, where it was adjudged, that *trespass* would lie against the parson for taking away her husband's coat-armour. That case was also cited in *Corven's* case as having been decided in 9 *Hen.* 4; but it is in the *Year Book*, 9 *Edu.* 4, 14. In *Pym v. Gorwyn* (a), Lord Coke cited *Lady Gray's* case, where she brought *trespass* against the parson for destroying her husband's arms and helmet in the church, and it was held to be maintainable. In a case like the present, where it is clear that some species of action is maintainable, one authority is sufficient. An allusion has been made by my Brother *Wilde* to cases of felony, *viz.* with respect to a tree severed and carried away by one continuous act, that the taking could not be felonious, unless some interval had elapsed between the severance and removal. We ought not, however, to apply a case of felony to the principles of common law; for in criminal cases, very nice distinctions are taken *in favorem vitae*;

but even in those cases a very slight interval between severance and removal will make the thing severed a chattel; and, when removed *animo furandi*, it falls within the principle of goods stolen, and taken from one county into another. It is said, however, that trespass cannot be maintained, because the freehold of the church-yard is in the parson; but it does not follow that monuments or tomb-stones therein placed or set up are not the property of those who erected them. If a person grant a lease, reserving the trees growing on the land, and the tenant cut them down, he is liable to an action of trespass. So, although a parson may have the freehold of the church-yard; yet he cannot remove or deface tomb-stones therein, as the property in them remains, either in the persons erecting them, or in the heirs of the party in memory of whom they are set up.

**Mr. Justice PARK.**—Lord *Coke* is an express authority to shew that the possession of monuments or tombstones is not in the parson, but, either in those persons who erect them, or in the heirs of the deceased.

**Mr. Justice GASELEE.**—The case of *Garven v. Pym*, as reported in *Godbolt*, merely decides, that, if a man, with the assent of the ordinary, set up a seat in the naye of a church, and another pull it up and deface it, trespass will not lie against him, because the freehold is in the parson; and that his only remedy is, to sue the party in the Ecclesiastical Court.

**Mr. Justice BURROUGH concurring—**

Rule refused (*a*).

(*a*) See Comyns's Digest, tit. "Cemetery," C.

1825.

Wednesday,  
June 8th.

To a declaration in trespass for assaulting the plaintiff, beating and kicking him, and tearing his clothes, the defendant pleaded that he was not guilty of the said supposed assault, *in manner and form* as the plaintiff had complained against him. The Jury having found a verdict for the plaintiff, damages, 20*s.*, and the Judge not having certified: Held, that the plaintiff was entitled to no more costs than damages, as the plea in substance denied the *battery* and tearing of the clothes, as well as the *assault*.

## WEATHERILL v. HOWARD.

THIS was an action of trespass.—The declaration stated, that the defendant, on &c., at &c., with force and arms, &c., made an assault on the plaintiff, and beat, bruised, wounded, and ill-treated him, and struck him many severe and violent strokes and blows on different parts of his body, and seized and laid hold of the plaintiff, and kicked and dragged him about, and then and there, with force and violence, rent and tore his clothes and wearing apparel which he then had on. The defendant pleaded that he was not guilty of the said supposed assaults above laid to his charge, or any or either of them, *in manner and form* as the plaintiff had above thereof complained against him; on which issue was joined. At the trial, before Lord Chief Baron *Alexander*, at the last Assizes for the county of *Kent*, it appeared that the defendant had merely collared and struck the plaintiff, and the Jury found a verdict for the latter, damages, twenty shillings; but nothing was said as to costs, nor did his Lordship certify that a *battery* had been proved. The plaintiff's costs were afterwards taxed at 7*l.*; and, on the defendant's agent inspecting the *postea*, he found that it had been altered as to the amount of the costs; and the associate, on an application being made to him, stated, that he had at first indorsed on the *postea*, "damages, 20*s.*, costs, 20*s.*," but that he afterwards altered the 20*s.* costs, to 40*s.*, on the plaintiff's attorney insisting that the plaintiff was entitled to full costs, as there was a *battery* and tearing of his clothes alleged in the declaration; and that, as the plea merely denied that the defendant was guilty of the *assaults* above laid to his charge, he had thereby admitted the battery and tearing of the plaintiff's clothes. The Prothonotary having allowed the plaintiff his full costs, and judgment for the increased costs having been accordingly signed—

Mr. Serjeant *Wilde*, in the last Term, obtained a rule nisi that so much of the judgment as related to the increased costs might be set aside; that the indorsement on the *postea* might be amended, by restoring the sum of 20*s.* costs, as it originally stood; and that the Prothonotary might be at liberty to review his taxation. The learned Serjeant cited the cases of *Mears v. Greenaway* (*a*), and *Lockwood v. Stannard* (*b*), as establishing the principle, that, in whatever shape an injury or damage to the plaintiff's clothes be charged in the declaration, in an action of assault and battery, the plaintiff will not be entitled to full costs, on a general verdict in his favour, if the damages be found under 40*s.*, and the Judge omit to certify that an assault and *battery* were sufficiently proved; at least, where the injury to the clothes is charged in the same count with the injury to the person of the plaintiff, and is alleged to have been committed at the same time and place.

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Mr. Serjeant *Vaughan*, and Mr. Serjeant *Lawes*, now shewed cause, and submitted, that, as the declaration contained three distinct charges against the defendant, *viz.* the *assaulting* the plaintiff, *beating and kicking* him, and *tearing his clothes*, and as the plea was confined to the *assaulting* only, the battery and tearing of the clothes were thereby admitted; and, therefore, that the plaintiff was entitled to his full costs. The only fact put in issue by the plea, was, the assault; and the plaintiff might, if he had thought proper, have signed judgment for want of a plea, as to the battery and tearing his clothes; instead of which he had joined issue as to the assault only. In *Smith v. Edge* (*c*), where, to an action for an assault and battery, the defendant pleaded the general issue,

(*a*) 1 Hen. Bl. 291.

(*b*) 5 Term Rep. 482.

(*c*) 6 Term Rep. 562.

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and a justification to the whole, and the plaintiff obtained a verdict, with one farthing damages, it was held that he was entitled to his full costs.

**Lord Chief Justice Best.**—I am clearly of opinion, that the plaintiff in this case is not entitled to his full costs. The defendant pleaded, that he was not guilty of the supposed *assaults* above laid to his charge, *in manner and form* as the plaintiff had above thereof complained. That, in substance, denies the *battery and tearing of the clothes*, as well as the *assaults*. Although the plea would have been more accurately drawn if the word “*trespasses*” had been introduced, yet the mere omission of that word will not entitle the plaintiff to his costs. He has joined issue on the whole of the plea, from which it must be inferred, that the battery and tearing of the clothes formed part of the assault, and were committed at one and the same time; and it was never intended that the assault, battery, and tearing the clothes, should be presented to the Jury as three distinct and substantive causes of action. The case of *Smith v. Edge* is altogether distinguishable from the present, as there the defendant, in his plea, admitted the assault, but attempted to justify the battery as well as the assault, which he failed to do.

Rule absolute.

*Thursday,  
June 9th.*

Where, in an action of slander, for giving a servant a false character, a rule for a new trial was made absolute, and the plaintiff had leave to amend one of the counts of the declaration, in order that the words charged to have been spoken might be made to correspond with those proved at the first trial, the Court allowed a new count to be added, to enable the parties to try the merits at the second trial.

#### WYATT v. COCKS AND WIFE.

**T**HIS was an action of slander, in giving the plaintiff, a female servant, a false character. The fourth count of the declaration (on which the verdict was taken for the plaintiff, damages 100*l.*,) charged the defendant's wife

with having said, "that the plaintiff was very unsteady;" and the person to whom the character was given, proved that the words were, that "there was a general want of steadiness in the plaintiff." In the last *Hilary* Term, a rule for a new trial was made absolute; and the plaintiff had leave to amend the fourth count of the declaration, in order to make the words therein laid correspond with those proved at the trial.

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v.  
COCKE.

Mr. Serjeant *Wilde*, on a former day in this Term, applied for a rule to shew cause why another count should not be added to the declaration, charging the words as proved on the former trial, and that the fourth might remain as it originally stood.

Mr. Serjeant *Vaughan* now shewed cause, submitting, that, as the Court had merely directed the fourth count to be amended, a new one could not be added, as it would have the effect of introducing a new cause of action.

Mr. Serjeant *Wilde*, in support of his rule, relied on the case of *Brown v. Crump* (a), where, the plaintiff having obtained leave to amend a count in his declaration which had been demurred to, and added new counts, containing no new cause of action, but only varying the manner of stating that which was demurred to, the Court refused to order them to be struck out, as they might be necessary to meet the different circumstances of the case; and he submitted that, in this case, as the new trial was granted in order to try the merits, the Court would allow the declaration to be amended as prayed.

(a) 1 Marsh. 609; S. C. 6 Taunt. 300.

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The Court, considering that the case of *Brown v. Crump*  
was precisely in point, ordered the rule to be made—

Absolute, on payment of costs.

### IN THE EXCHEQUER CHAMBER.

*Friday*  
June 10th.

WILLIAMS and Others *v.* BARTON and Another.

[In Error.]

*A. B. and C. D.* having agreed to purchase cottons on their joint account, *A. B.* directed his brokers to buy the same. The purchases having been made, *East India* warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of *A. B.* Immediately after the purchases, *C. D.* paid *A. B.*

one half of the value of the cotton. When half the purchases had been completed, the brokers were apprised of the interest that *C. D.* had in the goods purchased. *A. B.*, after this, directed the brokers to procure him a loan on the security of the warrants; and *E. F.* advanced money by discounting bills drawn by *A. B.* upon the brokers, as a security for which the whole of the warrants were deposited with *E. F.* by the brokers. While they were so deposited, the brokers received directions, both from *A. B.* and *C. D.*, to make a division of the goods held on their joint account; which they did, by appropriating specific warrants to each party; and the division was approved of by both. After half the bills had been paid, the brokers were directed by *A. B.* to get the other half renewed, which *E. F.* agreed to do, and accordingly discounted fresh bills; and the brokers then left in the hands of *E. F.*, as a security for the money last advanced, the warrants appropriated to *C. D.*, *E. F.* not then knowing that *C. D.* had any interest in them:—Held, that, by the division, the original lien of *E. F.*, and the partnership, or tenancy in common, of *A. B.* and *C. D.*, were determined; and that, that being so, the second pledge was the pledge of a specific chattel belonging to *C. D.*, which the brokers had no authority to make; and, consequently, that *C. D.* might maintain trover against *E. F.* to recover the goods so pledged.

(a) See 5 Barn. & Ald. 395.

on which a writ of error was brought by the defendants below, which now came on for argument in this Court. The special verdict was in substance as follows:—

"In the year 1818, *John Moon*, who then carried on business at *Manchester* as a cotton merchant, under the firm of *J. Moon & Son*, having agreed with the plaintiffs below, who also carried on business at *Manchester*, to make a purchase, on joint-account with them, of cottons, gave directions to his brokers, *Hunt & Sharp*, of *London*, to purchase, at the *East India Company's* sales, cotton to a considerable amount, on the account of *J. Moon*. *Hunt & Sharp* accordingly purchased, at several sales between the months of *January* and *June* in that year, cotton to the amount of 20,000*l.*, and obtained orders for the delivery of it, commonly called *East India warrants*, which were made out in the name of *Hunt*, as the broker employed at the sale, and were left in the possession of *Hunt & Sharp*, as the brokers of the said *J. Moon*. The plaintiffs below, immediately after the purchases, paid *Moon* one half of the value of the cottons. *Hunt & Sharp* knew that *Moon & Son* were occasionally in the habit of making purchases on joint account; but, at the time of making the first purchases in question, they had no knowledge that the plaintiffs below were in any way concerned. When half the purchases were completed, *Hunt & Sharp* were apprised by *Moon & Son* that the plaintiffs below had an interest in the purchases in question. It was subsequently agreed between the plaintiffs below and *J. Moon*, that the cottons should be divided; and, accordingly, directions contained in letters, dated the 6th and 11th *February*, 1819, were given by the plaintiffs below to *Hunt & Sharp*, to make division of the cottons held by them on the joint account of *Moon & Son* and the plaintiffs below; and *Hunt & Sharp* having received similar directions from *Moon & Son*, about the same time, proceeded to make the division, by specifying, in separate columns, the

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warrants which were respectively appropriated to the plaintiffs below, and to *Moon & Son*; and on the 20th *February*, 1819, they communicated such division to both parties, and received their approbation of the same.

About the latter end of *November*, 1818, *Hunt & Sharp* had received directions from *J. Moon*, to procure him a loan of from 20,000*l.* to 25,000*l.* on the security of the *East India* warrants then in their possession, and they informed the defendants below of the request of *J. Moon*, and applied to them to discount the acceptances of them, *Hunt & Sharp*, on bills drawn on them by *Moon & Son*, upon the security of the whole of the warrants; which the defendants below agreed to do. Accordingly, eight bills of exchange, payable three months after date, were drawn by *Moon & Son* upon, and accepted by, *Hunt & Sharp*, for sums amounting in the whole to 20,272*l.*, two of which were dated on the 24th *November*, two on the 26th *November*, two on the 28th *November*, one on the 1st *December*, and one on the 2d *December*, 1818, falling due respectively on the 27th *February*, the 1st, 3rd, 4th, and 5th of *March*, 1819; all of which were duly paid at maturity. These bills were discounted by the defendants below in the beginning of *December*, 1818, and, at the time of receiving the money from the defendants below, and as a security for the payment of the bills, *Hunt & Sharp* deposited with the defendants below the whole of the warrants.

On the 23d *February*, *Hunt & Sharp* received from *Moon* the following directions contained in a letter dated 15th *February*, 1819: "Half the amount from *Williams's* is all I would wish, or even nothing if you could force off every bale of cotton I have in *London*, cash in time. If half should be done by *Williams & Co.*, Mr. *Barton's* warrants might still remain." In consequence, an application was made by *Hunt & Sharp* to the defendants below to renew 10,000*l.* of the amount of the original bills, which they agreed to do by discounting other bills si-

milar to the former, on a sufficient number of the warrants to cover them to that amount being left as a security for such renewal. *Hunt & Sharp* did not, at any time previous to such renewal, communicate to the defendants below, that any alteration had taken place in the property, or that the plaintiffs below had any concern in it. On the 2d *March*, *Sharp*, of the firm of *Hunt & Sharp*, received the warrants from the defendants below, for the express purpose of dividing them, so as to take 10,000*l.* worth of them away, and to return 10,000*l.* worth to the defendants below to remain as a security for the renewed bills, and took them to his counting house for the purpose of making such separation; and, having done so, he returned to the defendants below the warrants belonging to the plaintiffs below, and retained those which had been appropriated to *Moon and Son*; and in so doing he acted by the direction of *Moon and Son*, but without any communication with, or authority from, the plaintiffs below. On the 2d *March* the defendants below discounted two bills, of 2490*l.* 8*s.*, and 2569*l.* 12*s.*, respectively, drawn, as before, ~~by~~ *Moon & Son* upon, and accepted by, *Hunt & Sharp*, and, on the 11th *March*, two other bills, of 2426*l.* 15*s.*, and 2584*l.* 16*s.*; which four bills amounted to 10,121*l.*, and which were dishonoured when they became due. All the transactions relating to the drawing, accepting, and discounting of the bills, and the depositing the warrants with the defendants below, took place without the knowledge, privity, or consent, of the plaintiffs below (a). The defendants below disposed of the warrants and cottons to their own use, and sold the cottons for 7,337*l.*

The question submitted, by the special verdict, for the opinion of the Court, was, whether, upon the whole matter, the defendants below were or were not guilty of the

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(a) This latter fact was added to the special verdict.

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truer and conversion of the whole, or the moiety of the warrants and cottons.

Mr. *Tindal*, for the plaintiffs in error.—No fraud can be imputed to either of the parties before the Court, as the defendants in error were altogether ignorant of the transaction which took place between *Sharp*, the broker, and *Moon & Son*; and the plaintiffs in error were equally ignorant of the interest the defendants in error had in the warrants and cottons sought to be recovered by this action. The question, therefore, to be decided, is one of strict and rigid law, and depends on two points. The plaintiffs in error contended, *first*, that they had a lien on the whole of the warrants deposited with them, or, at all events, on an undivided moiety of them, to the extent of the bills last accepted. But, if that were not so, *secondly*, that they were tenants in common with the defendants in error of the whole of the warrants so deposited; and, therefore, that they were not liable to be sued in trover, as that action cannot be maintained by one tenant in common against another. The interest which the defendants in error and *Moon & Son* had in the cottons may be considered in two points of view: either that the defendants in error were sub-contractors under *Moon & Son* for a moiety of the property previously vested in the latter, in which case, the pledge of the whole of the warrants by the broker, and the lien on them by the plaintiffs in error, would have been legal; or, if both were originally interested, that then they were partners in the transaction; and, in either case, the pledge made by the broker would bind their interest. That the plaintiffs below were sub-contractors with *Moon & Son*, is supported by the facts found by the special verdict. *Moon* was the person who first gave directions for the purchase of the cottons on his

own account; and they were purchased accordingly. The warrants were made out to *Hawt & Sharp* as his brokers; and they at that time had no notice that the plaintiffs below had any interest in the cottons, but looked to *Moon* alone as the real purchaser. It is true, that, afterwards, the brokers, *Hawt & Sharp*, knew that the plaintiffs below had an interest in the purchase. But that circumstance will not affect the rights of third parties, who were ignorant that the purchases were joint, at the time they were made. With respect to them, the plaintiffs below cannot be considered as original purchasers, but only as sub-contractors; and, if they were merely such, the property of the cottons was in *Moon*, and he had a right to dispose of them. In *Saville v. Robertson* (a), it was held, that a person not actually a partner, and liable at the time of a contract, cannot be charged by afterwards acknowledging himself to be responsible. There, though goods were purchased for the purpose of being shipped on a mercantile adventure, yet, as the supercargo alone appeared in the transaction, he was deemed to be solely interested, although the purchasers were each to purchase separately, and pay for the goods which were to be shipped. So, in *Young v. Hanter* (b), where one person purchased goods for exportation, and another was afterwards permitted to share in the adventure, it was held that the vendor could not recover the price of the goods against the person who took the subsequent share; and Lord Chief Justice *Gibbs* there said, "I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor; as, if the parties agree among themselves that one house shall purchase the goods, and let the other into an interest in them, that other being unknown to the vendor; in such a case the

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(a) 4 Term Rep. 720.

(b) 4 Taunt. 582.

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vendor could not recover against him, although such other person would have the benefit of the goods." Here it was not known to the brokers that the plaintiffs below and *Moon & Son* were joint purchasers of the cottons, at the time the purchase was directed to be made. If, however, the purchase vested an undivided moiety of the cottons in each of the parties from the commencement, yet, as the purchase was made jointly for both, and each had an interest, *Moon & Son* were tenants in common with the plaintiffs below, and had a right to pledge the whole as against the latter; and although the broker had only authority to pledge the undivided share of *Moon*, yet the defendants below, by taking that pledge, became tenants in common with the plaintiffs below. If two persons purchase an article jointly, they are, until severance, tenants in common; and it is a well known principle, that whatever is done by one of two tenants in common will bind the interest of the other; and that applies to cases of partners. In *Raba v. Ryland*(a), it was held, that a pledge, by one partner, of partnership property, would bind his co-partners, although the pledge was made without their privity or consent, provided the pledgee had no notice that the property was joint, and there was no fraud in the transaction. There, *Raba* and *Robles* having purchased clover seed at *Bourdeaux*, on the joint account of themselves and one *Caumont*, in equal thirds, the seed was shipped to the consignment of *Caumont*, and a bill of lading and invoice were transmitted to him; and, on the receipt of the bill of lading, he lodged it with the defendants for the landing and sale of the seed, and afterwards procured from them an advance of money on it, the defendants not having notice of any joint interest in the seed; and Lord Chief Justice *Dallas* said: "The situation in which *Caumont* stood, with respect to the property, cannot be assimilated to

(a) Gow's Ni. Pri. Cas. 132

that of a naked factor or consignee. Being jointly interested in the seed with the plaintiffs, as a partner, he was in that character possessed of the entirety. The pledge by him, therefore, does not resemble a pledge by a factor, to whom goods are consigned for sale merely. As a partner, he had a clear right to sell: indeed, the seed was consigned to him for that purpose; and, possessing that right, he borrows money of the defendants on the security of this seed, and until a sale of it can be effected. So far from its being pretended that the defendants had notice, that the seed was partnership property, the contrary is admitted:" and, under his Lordship's direction, the Jury found a verdict for the defendants. So in *Tupper v. Haythorne* (a), Sir William Grant decided at the Rolls, that, in the absence of collusion and fraud, one partner may pledge joint property, so as to bind his co-partner, although the latter be ignorant of the pledge. These cases are precisely in point to shew that no distinction can be drawn in this respect, between general partners, and partners in an individual transaction; and here it is quite clear, that, to the time of the division of the warrants, the plaintiffs below and *Moon & Son* were partners; and, if so, the defendants below had a lien upon the whole of them for the full amount of the bills discounted by them, or, at all events, for such as were then unpaid. In *Ex parte Gellar* (b), *A.* and *B.*, trading under the firm of *A. & Co.*, agreed with *C.* to purchase goods on a joint account, of which *A.* and *B.* were to have the management. The goods were purchased, and *C.* paid *A. & Co.* for his share, and they, without the consent of *C.*, deposited the goods with *D.*, who advanced money on them, and, ignorant that *C.* was concerned, debited *A. & Co.* with the advances. The goods were sold at a loss, and a commission of bankrupt issued against *A.* and *B.*, and another against *C.*; and it was held

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(a) Gow's Ni. Pri. Cas. 135 n.

(b) 1 Rose Bank. Cas. 297.

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that *D.* was entitled to prove his balance beyond the proceeds, against the estate of *C.*, as well as against the estate of *A.* and *B.* Although it may be said that the subsequent arrangement as to the division of the warrants deprived *Moon* of the right to pledge those belonging to the plaintiffs below; yet, at all events, the defendants below had a lien on *Moon & Son's* undivided moiety, and that lien was not destroyed by their entrusting the whole of the warrants to *Sharp*, as they did so in utter ignorance of the interest the plaintiffs below had in them; and although the division was made by *Sharp*, and he wrongfully returned the warrants belonging to the plaintiffs below, still *Sharp* was the agent of the defendants below for the sole purpose of dividing the warrants for the supposed benefit of *Moon & Son* alone; and, if so, the lien of the defendants below still subsisted, at all events, to the extent of the warrants returned; they having previously had a lien on the whole.

After the pledge by *Moon*, the plaintiffs in error were tenants in common of the warrants with the defendants in error, or, at all events, of the moiety returned, and therefore could not maintain an action of trover unless there had been a destruction of the property. In *Coke Littleton* it is laid down (a), that, "if two have an estate in common, the one cannot have an action of trespass against the other; for, that each of them may enter and occupy in common, &c., per my et per tout, the lands and tenements which they hold in common. But, if two be possessed of chattels personal in common by divers titles, as of a horse, &c., if the one take the whole to himself out of the possession of the other, the latter hath no other remedy than to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time, &c.;" and Lord *Coke*, in commenting on that passage, says, "if two tenants in com-

(a) *Littleton*, Sect. 323.

(b) *Co. Litt.* 200 a.

mon be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespass *quare vis et armis* &c.; for the whole flight is destroyed, and, therefore, he cannot in bar plead tenancy in common; and so it is, if two tenants in common be of a park, and one destroyeth all the deer, an action of trespass lieth." But, when property in the thing subsists, neither trespass nor trover can be maintained. In *Heath v. Hubbard* (a), it was held, that a sale of the whole of a ship by one who was only a part-owner, in exclusion of the right of another who was tenant in common with him, was not equivalent to the destruction of the subject-matter, either mediately or immediately, so as to enable his co-tenant to maintain trover against him for it, as the ship remained in specie: and the case of *Barnardiston v. Chapman* is there cited (b), where one tenant in common of a ship took her away and sent her to the *West Indies*, where she was lost in a storm; in trover, Lord Chief Justice King left it to the Jury, to say whether, by the defendant's force, the ship was actually taken from the plaintiff, and secreted, and carried out of his power to preserve her, and a destruction happening in those circumstances, whether it should not be found to be a destruction by the defendant's means; which the Jury found, and the Court afterwards held that the direction to the Jury was right, and refused a new trial. From these authorities it is quite clear, that the true distinction in order to enable a party to maintain trover, is, whether the subject-matter be destroyed or not. Here the cottons were only changed or converted into money; and, if the plaintiffs below had any remedy, it was by filing a bill in Equity for an account of the proceeds of the sale of the cottons.

*Mr. F. Pollock, contra.*—It is found as a fact, that the

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(a) 4 East, 110.      (b) Bull. Ni. Pri. 7 Ed. 34. S. C. 4 East, 121, n.

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original agreement was, to make a purchase on the joint-account of the plaintiffs below and *Moon*. The former, therefore, were not sub-contractors with the latter; and, if so, that disposes of the case of *Young v. Hunter*, as there, the original purchaser afterwards permitted another to share in the adventure. Admitting that *Moon* directed his brokers to make a purchase on his account, yet the purchase was not made in the name of *Moon*, but in that of *Hunt* the broker, and the warrants were made out accordingly. When, therefore, the contract was made by him, it enured for the benefit of all the parties really interested; and *Hunt* was not a trustee for *Moon* alone, but also for the plaintiffs below, it being originally intended that both parties should be jointly interested in the purchase. It further appears, that, immediately after the purchase, the plaintiffs below paid *Moon* for their share of the cottons; and a contract of sale, accompanied with payment, transfers the property to the purchaser without an actual delivery. It is then found, that a division of the cottons and warrants took place in *February*, 1819, which was communicated to both parties on the 20th of that month, and approved of by them. From that day, the plaintiffs below became separately possessed of, and entitled to, all the warrants assigned or appropriated to them, and *Moon*, to the others; and, after that division, *Moon* and the plaintiffs below must have brought separate actions against *Hunt & Sharp*, if they had refused to deliver them. All the warrants, then, being in the possession of the defendants below, the broker, on the 2d *March*, 1819, after the whole of the first bills had been paid, obtained possession of them to make a separation, which was accordingly done; but he withdrew those assigned to *Moon & Son*, and re-delivered those appropriated to the plaintiffs below. On the 5th *March*, the last of the old bills was paid, and on the 2d the defendants below discounted two of the new bills, and on the 11th two more; and to those their

claim must at all events be limited. These being the facts of the case, it has been insisted that trover is not maintainable, as the defendants below became tenants in common with the plaintiffs below, by virtue of the pledge made to the former by *Moon*, who was also a tenant in common with the plaintiffs below. But the pawnee of property is not clothed with the rights of the absolute owner. He has a mere lien, or right to hold the property in his hands, until the claim, in respect of which the lien arises, is satisfied. A mere lien does not confer an absolute right to property, but a bare right of possession; and a pawnee cannot sell or dispose of property pawned, to repay himself, unless there be an implied contract to that effect. Here, the warrants were merely deposited with the defendants below by way of security; and, they having previously belonged to the plaintiffs below, the former were clearly responsible to the latter, in an action of trover, for the proceeds of the sale. Lord Chief Justice *Abbott*, in giving his opinion on the trial of this cause in the Court below, said (*a*): "It is laid down by Lord Chief Baron *Comyns*, that, if a bailee sell the goods of another, the very act of sale on his part is such a conversion as to entitle the owner to maintain trover (*b*); and if that be so, it follows, that, if a bailee, in possession of undivided shares belonging to two persons, sell the whole, it must be a conversion as to the undivided part belonging to one over which he has no right or title whatever." Where a bailee or pawnee sells goods entrusted to him, although he have a lien on them, yet when trover is brought against him for their recovery, he can only claim to the extent of his lien, the amount of which the Jury may take into their consideration in mitigation of damages. But, looking at the relative situations of these parties, the defendants below never were tenants in common, nor had

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(*a*) 5 Barn. & Ald. 401.      (*b*) Com. Dig. tit. "Action on the Case upon Trover," E., citing 2 Salk. 655.

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they any property in the goods, no assignment of any interest having ever been made to them. Originally they had a mere bailment by way of lien; and that was afterwards destroyed by the division or separation of the cottons and warrants made by the brokers. In *Saville v. Robertson*, two of the joint adventurers were not the original contractors; and as the supercargo made the purchase in his own name, he was considered as solely interested. That was a mere question of credit; but here the original purchase was on the joint account of the plaintiffs below and *Moon*. The brokers were trustees for both, and afterwards divided and appropriated the warrants to each respectively. The case of *Ex parte Gellar* does not apply, as there, there were three partners, and, although the goods were pledged by two only, yet the partnership was not disputed; and, therefore, it was held that the third partner, if he were to have shared in the profits, must be liable for the loss, and had such an interest as to make his engagement binding. The main question, however, raised by this case, is, whether the property of a person can be pledged without his consent. In order to ascertain this, it is necessary to draw the distinction between a sale and a pledge. In the one case, the purchase-money is advanced on the credit of the property; in the other, the law supposes that the lender reposes a confidence in the party pledging, that he will not pledge unless he be duly entitled to do so: and, if the latter have no authority to pledge, the pledge is not available. Pledging property is not in the ordinary course of commerce; and here, as the defendants below took no assignment of interest or property in the cottons or warrants, but a mere legal right of possession till the happening of a certain event, *vis.* the payment of the bills for which the advances were made, they are liable to the plaintiffs below for the conversion of their property; and the latter were, consequently, entitled to recover in this action.

Mr. *Tindal*, in reply.—The pawnee of goods has, by de-

livery, a special property in them, in contradiction to the rights of the absolute owner; and if they be improperly taken out of his possession, he may maintain trover for their recovery. Here, no assignment of the property was necessary; for, the moment the delivery-warrants were handed over to the defendants below, they had a right to hold them as against all the world; and even as against the original owners, until they had redeemed the pledge. The circumstances under which they were delivered clearly made the plaintiffs below tenants in common with the defendants below. The question, therefore, as to the sale, does not arise as if the pledge had been made by a stranger; and at all events the defendants below were entitled to an undivided moiety of the warrants, to the extent of the bills last accepted.

**Lord Chief Justice BEST** delivered the judgment of the Court as follows:

The counsel for the plaintiffs in error has truly said, that this case must be decided according to the strict rules of law. Sitting here as a court of law, whatever our private opinion may be, we are bound to decide according to law. It is, however, in the contemplation of the legislature to alter it, so as to provide for cases like the present; and it cannot be denied but that the intended alteration will be better adapted to the present state of society (*a*). In ancient times, persons kept their property in their own hands; and although agents and factors were then well known, yet their situation with regard to property entrusted to them, and the extent of their authority, were ascertained. But in modern times, the factor or agent frequently stands

(*a*) See the statute 6 Geo. 4, c. 94, "An act to alter and amend an act for the better protection of the property of merchants, and others, who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise, entrusted to factors or agents."

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forward as the proprietor of goods, whilst the real owner keeps himself in the back ground. It is, however, for the Legislature to remedy this evil by statute, by providing, that, where the owner of goods allows a factor or agent to hold himself out to the world as the principal, he shall be bound by the acts of such agent. Possession is not proof of ownership of property; and in this case the brokers or agents had a mere possession, and cannot be considered in the same light with the assignees of a bill of lading. The *East India* warrants are nothing more than the keys of the warehouses; and, as these brokers had only the possession of the property, it did not confer on them a right to dispose of it to the prejudice of the true owner, who, not having assented to, is not to be bound by, their acts. Two arguments have been urged in this case: *first*, that, by the act of the plaintiffs below, and *Moon & Son*, they were constituted partners in this transaction, and that the pledge made by the brokers of the latter was binding on the former; and, therefore, that the defendants below had a lien upon the whole of the warrants. The *second* is so connected with the *first*, that, in deciding the one, we dispose of the other. It is this,—that the defendants in error, being tenants in common with the plaintiffs in error of the whole of the warrants, the former cannot maintain an action of trover in a Court of law, but their rights, if they have any, can only be established in a Court of Equity. We should have thought that there was much weight in that argument, if the transaction had continued as it first began, and the second arrangement had not taken place. But it is unnecessary for us to say what the situation of the parties would have been, had the original agreement remained undisturbed; because, we consider, that, by the *second*, all prior right of lien by the defendants below was given up, and a new contract entered into. Antecedently to this, a division of the goods was made by the brokers, and assented to by both parties; and one moiety became the sole property of the plaintiffs below, and the

other moiety that of *Moon & Son*. From that moment there was an end of all partnership; and for that purpose *Sharp* was the agent of one party for his moiety, and of the other party for the other moiety. *Sharp*, therefore, could have had no authority, in consequence of any right conferred on him by *Moon & Son*, to pledge the moiety of the plaintiffs below; because they were then perfect strangers as to the share which belonged to them. After the separation and division of the goods, the warrants of the plaintiffs below, as well as those of *Moon & Son*, were returned to the brokers; and, when they got them back, they held those which related to the share of the plaintiffs below, for them, and those which related to *Moon's* share, for him. If so, neither *Moon* nor the brokers could then pledge the warrants of the plaintiffs below without their assent, nor could their rights be affected. But it appears, that, by a fraud between the brokers and *Moon*, and without the authority of the plaintiffs below, they pledged or deposited with the defendants below the warrants which belonged to the plaintiffs below, as a security for the sum of 10,000*l.* which was advanced solely to *Moon & Son*. The transaction, therefore, reduces itself to the simple case of one man pledging the property of another without his assent or authority; and the question comes simply to this, *viz.*, whether, when property is so pledged, the pledgee can have such an interest in it as to create a right of lien against the true owner. As the law now stands, we take it to be clear, that, if property be left in the hands of an agent, he cannot affect the rights of his principal, the owner of the property, without his assent; and consequently, that the plaintiffs below were entitled to recover in this action. As, therefore, the first pledge was wholly given up, and an entire new contract made by the second transaction, which affected the whole of the property sought to be recovered, we are all of opinion, that the judgment of the Court below must be —

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Affirmed.

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A plaintiff, a  
*Scotchman*, not  
actually domi-  
ciled in this  
country, but only  
occasionally re-  
siding here, is  
bound to give  
security for  
costs.

**NAYLOR v. JOSEPH.**

MR. Serjeant *Wilde*, on a former day in this Term, ob-  
tained a rule *nisi*, that all proceedings in this cause might  
be stayed until the plaintiff should give security for the pay-  
ment of costs, upon an affidavit stating that he was resident  
in *Scotland*, and out of the jurisdiction of this Court.

Mr. Serjeant *Lawes* now shewed cause, on an affidavit  
which stated, that the plaintiff was a merchant at *Edinburgh*;  
that the defendant was his agent or broker in *London*, to  
whom he had confided his mercantile transactions there;  
and that the present action was brought against the defendant  
for not accounting. It was also sworn, that the plain-  
tiff was frequently in the habit of coming to this country,  
and that he in fact passed as much of his time here as in  
*Scotland*. The learned Serjeant relied on the case of  
*Durell v. Mattheson* (*a*), where the Court refused to require  
security for costs from a foreigner, during his absence  
from this country on board his own ship, as he resided  
here part of the year; and he submitted, that an occasional  
residence in this country by a foreigner, is a sufficient an-  
swer to a rule requiring him to give security for costs.

But the Court held, that the general rule ought not to  
be deviated from, and that, if the plaintiff were not actual-  
ly domiciled in *England*, he was bound to give the defend-  
ant the security required.

Rule absolute.

(a) 3 B. Moore, 33.

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## RATCLIFFE v. BLEASBY.

THIS was an action brought to recover compensation in damages, for the breach of an agreement, entered into by the defendant, to take the plaintiff into partnership; a draft of the articles of co-partnership was prepared by the defendant's attorneys, perused and settled by the plaintiff's attorney and returned by him to them; a deed of co-partnership was afterwards engrossed, and executed by the defendant, and retained in his possession. The plaintiff had no copy of the deed nor of the draft; and the defendant and his attorneys refused to furnish copies of them at the plaintiff's expense, or to permit an inspection.

Mr. Serjeant *Cross*, in the last Term, on an affidavit (by the plaintiff's attorney) of these facts, obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to inspect and take a copy of the deed of co-partnership, and of the draft of the agreement from which the deed was engrossed, and he relied on the case of *Morrow v. Sanders* (a). The Court required an affidavit, by the plaintiff, or his attorney, to shew for what purpose the inspection and copy of the draft and deed were required; and an affidavit, by the plaintiff's attorney, was accordingly produced, stating, that his special pleader had desired the application to be made, in order to enable him to draw the declaration; and that the plaintiff could not declare without such inspection. The rule was enlarged till this day, for the purpose of the defendant's filing an affidavit in answer.

Mr. Serjeant *Wilde*, now shewed cause, on an affidavit,

The plaintiff and defendant being about to enter into partnership together, a draft of an agreement was prepared by the defendant's attorney, which, having been perused and approved of by the plaintiff's attorney, was engrossed, and executed by the defendant, but was not executed by the plaintiff. The plaintiff afterwards brought an action against the defendant for a breach of the agreement for the partnership, and applied for leave to inspect and copy the draft and deed:—The Court refused the application as to the deed, on the ground, that the plaintiff, not having executed, had no interest in it; but they allowed it as to the draft, the plaintiff having an interest in that, and the defendant holding it as a trustee for him.

(a) 3 B. Moore, 671. S. C. 1 Brod & Bing, 318.

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stating, that the draft of the articles of partnership, for the breach of which this action was brought, was prepared by the defendant's attorneys, and left with the attorney for the plaintiff, who perused, settled, and approved it, and afterwards returned it to the defendant; and that the deed had never been executed by the plaintiff, as it differed in many respects from the draft settled and returned by him to the defendant. The learned Serjeant submitted, that the Court would only grant the inspection of a deed, as between parties to a suit, where it is held by one as trustee for the other; which could not have been the case here, as the plaintiff had not executed it, and, consequently, no cause of action could arise against him in respect of it, nor could he enforce it as against the defendant.

Mr. Serjeant *Cross*, in support of his rule.—As the plaintiff cannot declare, or safely proceed to the trial of the cause, without the inspection required, the defendant was bound to grant it, and he would suffer no inconvenience or prejudice by such inspection. The case of *Morrow v. Sanders*, is expressly in point, with the exception that there the plaintiff had executed the deed which was retained by the defendant,—whilst here it was executed by the defendant alone. There, too, as here, the plaintiff made an affidavit, that he sued the defendant to recover damages for the breach of an agreement, in not entering into partnership, pursuant to a partnership deed drawn up and executed by the plaintiff, but remaining in the custody of the defendant or his attorney; and that the plaintiff possessed neither a copy nor a counterpart of the deed; and the Court granted a rule for the plaintiff to inspect and take a copy of the deed, although the defendant swore that he had not executed the same. In *Clifford v. Taylor* (a), Sir James

*Mansfield* said :—“The practice of compelling the delivery of copies is very convenient, for it saves the delay and expense of a bill in equity.” In *Blakey v. Porter* (*a*), where one part of an indenture only was executed, the Court compelled the party having the custody of it, to produce it for inspection, in an action brought against him by the other party; and in *Bateman v. Phillips* (*b*), the Court compelled the defendant to produce an agreement in his custody (not executed by the plaintiff), on an assertion by the latter that he had an interest in it; and, during the argument in that case, Mr. Justice *Heath* observed (*c*), “that the rule restraining the production of instruments to the application of a party named therein, was much too strict; for suppose a person, though no party to a deed, took an estate by way of remainder, he had, nevertheless, a strong interest in the deed, and was entitled to compel the production;” and afterwards, in delivering his judgment, he said :—“Certainly the jurisdiction has been frequently exercised, and very much to the advantage of suitors, and furtherance of justice.” So in the case of *King v. King* (*d*), the Court ordered the defendant, in an action of covenant on a deed which he held, to produce it to the plaintiff for the purposes of the cause. These authorities shew that the Courts have long recognized this practice, not only as being convenient, but also as being within the scope of their equitable jurisdiction; and here, as the draft of the agreement on which the deed of partnership was to be founded, was assented to by both parties, the plaintiff is, at least, entitled to take a copy of it for the purpose of declaring; as, unless the terms of the partnership be correctly set out, he will be nonsuited on the ground of a variance, and thereby prevented from trying the cause on its merits.

**Lord Chief Justice Best.—I** for one agree with the ob-

(*a*) 1 Taunt. 386.

(*b*) 4 Taunt. 157.

(*c*) Id. 161.

(*d*) Id. 666.

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servation made by Sir *James Manfield*, in *Clifford v. Taylor*, that the practice of compelling the delivery of copies of papers, is most convenient, as it saves the delay and expence of a bill in equity; for it is an extreme hardship to deprive suitors of an immediate common law right, and put them to the expence of litigation in another Court. If, however, the law of the land compels them to pursue that course, we have no authority to alter it; for our constitution has most wisely left the correction of any imperfection or defect, to a higher tribunal, *viz.* the wisdom of the Legislature. But the only question in this case is, whether we are warranted by any rule of practice, established in this Court, to grant the application in the terms prayed by the plaintiff. If we had such authority, I should be most happy to make the order to the extent required, as the parties would be likely to attain justice earlier, and at a less expence. With respect to the deed, if we were to order its production, we should go much farther than the Court has ever yet done, as it appears by the affidavits in support of, and in answer to, the application, that, although the deed was executed by the defendant, yet that the plaintiff had refused to sign it. By his refusal to execute the deed he has repudiated all his interest in it, and he cannot now call on the Court to order the production of it by the defendant, or an inspection of it for the plaintiff's purpose or advantage. The established principle on which the Courts have acted, is, that they will not direct a party to the suit to produce a deed in his custody, unless the applicant shew that such person holds it as a trustee. It is necessary that I should in the first place advert to the facts stated in the case of *Bateman v. Phillips*, where the person applying was not a party to the instrument, but the ground of the application was, that the applicant had *an interest* in the writing, the production of which was required. The affidavit there on which the rule to produce the agreement was obtained, disclosed

the circumstances which were the foundation of the action, *viz.* that a person of the name of *Bowling* hearing that the *Milford* Bank had got into discredit, and that there had been a run upon it, suggested to the bankers, that if the defendant would come forward with a large sum and support their credit, the public would be satisfied; that the defendant accordingly came to the bank, and declared to *Bowling* and the several creditors then present, that he would assist the bank with 30,000*l.*, and that he would be responsible for its credit to that amount, and requested such creditors to make it known to such of their neighbours as might be holders of the notes, and creditors of the bank; on which *Bowling* proposed to the defendant, that he, *Bowling*, should have the defendant's writing to the effect of the above declaration to the creditors then present, as an authority for using the name of the defendant to the inhabitants of *Pembroke* and its vicinity, that he, the defendant, had agreed to support the credit of the bank to the above extent; to which the defendant assented, and signed a written notice or agreement drawn out by *Bowling*, which expressed that he, the defendant, thereby authorized *Bowling* to assure the inhabitants of *Pembroke* and its vicinity, that he, the defendant, thereby undertook to be accountable for the payment of notes issued by the *Milford* bank, as far as 30,000*l.* would extend to pay, which would be an additional security to the public, to that amount, to the estate and effects of the partners in the bank. It was also sworn that the declaration, so signed by the defendant, was delivered to *Bowling*, who caused several notices to that effect to be printed, and distributed throughout different parts of the county of *Pembroke*. *Bowling* kept the original notice for some days after, until his brother-in-law, one of the partners in the *Milford* bank, came to him and asked him for the notice, which *Bowling* gave him, and which was afterwards delivered to the defendant. There,

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too, it appeared, by the plaintiffs' declaration, that they were creditors of the bank, and, therefore, the authority in writing given by the defendant to *Bowling*, was for their advantage as well as for that of the other creditors, for whom *Bowling* held it as a trustee; and, as the defendant obtained it through his brother-in-law, who was one of the partners in the bank, from *Bowling*, the plaintiffs had a right to call for its production; and Sir *James Mansfield* there said (a):—"This is a rule, calling upon the defendant to produce a certain paper, and it is made on the grounds that the plaintiffs are *interested* in that paper, and that is the only ground on which they can support their application. On the declaration the plaintiffs state, that, at the time of the giving of the guarantee, they held some notes, and, in consequence of it, became possessed of others. They stated in their affidavit, that the paper in question was delivered to *Bowling*, who caused several such papers to be printed, and affixed in various parts of the county, and that he gave up the original in consequence of an application made by the defendant." His Lordship, therefore, put it on the ground that the paper was in the hands of *Bowling* as a trustee for the creditors of the bank, and said: "This paper is certainly not of a public nature, like corporation books or records; but it is a paper in which the plaintiffs are interested. In the case of *Taylor v. Osborne*, in the Court of *King's Bench*, it seems admitted, that, if the party had been interested, he might have had the production of the instrument." So here, if the plaintiff had shewn that he had any interest in the deed, he would have had a right to inspect and take a copy of it, on stating that the defendant retained it in his custody, and had refused to grant such inspection. The case of *Morrow v. Sanders* is altogether distinguishable from the present, as there, the plaintiff, who applied for the deed,

had *executed* it. He had, therefore, clearly a right to demand an inspection or copy from the defendant, although the latter had *not* executed it; and it would be contrary to honesty and principle, if the latter could hold it as against the former. That case, therefore, is quite the converse of this, as, there, the deed was executed by the party applying for it, and not by the other in whose custody it remained; whereas here, the plaintiff had refused to execute it, and until he has done so he cannot be said to have an interest in it. The case of *Blakey v. Porter*, was decided on the same principle as that of *Bateman v. Phillips*, and Sir *James Mansfield* there asked: "Of what use would the defendant's covenant be, if the plaintiff could not get access to it? Parties, in order to save the expence of double stamps, are, unwisely, content to execute one part only of an indenture. It is not, however, the necessary consequence of this practice, that the party who has the custody undertakes to produce the deed, when wanted, for the use of both." In that case, however, the deed was executed by both parties, and his Lordship, therefore, put it on the principle of an implied undertaking, that the party who had it in his custody held it as a trustee for both. In *Street v. Brown* (a), where two parts of an indenture were executed by both parties, each keeping one, and one part was lost, this Court would not compel the party holding the other to produce his part, in order to support an action against him on the instrument; on the ground that the party who had it did not hold it as trustee for the other; and the cases of *Blakey v. Porter*, *Bateman v. Phillips*; and *King v. King*, were there referred to in the course of the argument, and Lord Chief Justice *Gibbs*, in delivering his opinion, said: "We must look to the principle on which those cases were decided, and must not suffer ourselves to be hurried away into a similar decision, in a case which does

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not fall within the same principle. In *Blakey v. Porter*, the circumstances must have been very strong in favour of the application; for Sir James Mansfield there put it on the ground of an implied undertaking by the defendant to produce the instrument. In *King v. King*, he says, 'he knows not how to refuse the application after the case of *Blakey v. Porter*',—hesitating even after that decision;—but, observing, 'it must be understood, that, when one part only of a deed is executed, the party holding it is trustee for the other.' That, therefore, was the ground on which these cases were decided; and it is unnecessary to enquire whether that were such a ground as did give the Court authority. Now, here, there were two parts of the instrument, and the plaintiff contends that the defendant must give him a copy of his part, in order that, the original being lost, he may make use of the copy at the trial. Suppose a bond were executed, and afterwards lost by the obligee, the obligor having kept a copy of it; by the same rule as that by which the plaintiff calls on the defendant in this case, might the obligee demand the copy of the bond from the obligor. There is no reason to induce the Court to grant this application, nor is there any case which has gone to such an extent; and the Court is unwilling to establish a precedent for such application."—His Lordship, therefore, deduced the true principle from these cases, *vis.* that where a defendant has the custody of a written instrument, which he holds as a trustee, the Court will order him, in some instances, to give an inspection and copy of it to the plaintiff. But, here, the defendant cannot be said to hold the deed in question as a trustee, as the plaintiff had expressly refused to execute it, and although it has been said that he may be nonsuited if it be produced at the trial, on the ground of a variance; still, if we were to accede to the present application, we should be deciding on motion, that which can only be got at by filing a bill of discovery. In ejectment, the

lessor of the plaintiff is liable to a nonsuit by the production of deeds which may shew a better title in another, but we cannot make an order for the production of such deeds. There is another Court to which the parties may resort, *viz.* a Court of Equity. I am, therefore, clearly of opinion, that the defendant in this case cannot be compelled to furnish the plaintiff with a copy of the deed of co-partnership, or even to allow him to inspect it, as it was not executed by him. But, as the draft of the articles of co-partnership, from which the deed was engrossed, was perused and approved of by the plaintiff, and afterwards returned to the defendant, if it still remain in the custody of the latter, he stands, as regards that, in the situation of a trustee for the plaintiff, who is, therefore, at liberty to inspect and take a copy of that instrument, but not of the deed to which he is no party.

Mr. Justice PARK.—I fully agree with my Lord Chief Justice. The cases in which the Courts have required the production or inspection of written instruments, appear to me to have gone farther than they ought. The principle on which these applications have been granted, is, that the party in whose custody such instruments may be, holds them as trustee for the party requiring their production; but, here, the defendant cannot be considered as a trustee for the plaintiff as to the partnership deed, as he refused to execute it. The principle laid down by the Court of *King's Bench*, in *Taylor v. Osborne*, is, that the Court would not, at the instance of a plaintiff, compel a defendant to produce an instrument which was in his hands, and to which the plaintiff was neither an instrumental party, nor a party in interest; and that appears to me to be the true rule. If, however, there be only one deed, but executed by both parties, it follows, as a matter of course, that the person in whose custody it is, holds it as trustee for the other. The case of *Street v. Brown*, touches very

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closely on that of *Taylor v. Osborne*, and appears to me to be a case of some hardship, as the charter-party on which the action was brought was lost at sea, together with the master and part-owner of the vessel, who had it on board with him, and his widow and administratrix wished to bring an action against the charterer for not loading the vessel, and accordingly applied to the Court to grant her an inspection and copy of the part of the charter-party left in the hands of the charterer: but the application was refused, although it was stated to be made for the purpose of the plaintiff's declaring with certainty. It has been said, however, that we have an equitable, if not a general, jurisdiction in cases of this nature. But it must be exercised according to the rules of law, and we must not infringe on the province of a Court of Equity; and here the plaintiff can claim no interest whatever in the deed, as he has not executed it. The case of *Morrow v. Sanders*, was decided since I took my seat in this Court, but it does not appear to me to bear on the present; as, there, the deed was executed by the party who required its production, *viz.* the plaintiff, whilst here it was not executed by him, but by the defendant alone; and, if so, the plaintiff can have no right to inspect it, nor can the defendant be said to hold it as a trustee for him. Although the draft of the articles, from which the deed of co-partnership was engrossed, does not appear to have been signed by the parties; yet, as it was approved of by both, it may be said that there is a mutuality of interest: so that, as to that, the rule must be made absolute.

Mr. Justice BURROUGH.—The Court will not accede to an application of this description at the instance of the plaintiff, unless he shew us that he could use the deed required in evidence at the trial; in which case, perhaps, we might lend him our assistance. This case is far stronger than that of *Street v. Brown*, as the deed in

question must be considered as mere waste-paper, as far as it regards the plaintiff, as it was never executed by him; and it cannot be a complete and perfect instrument until executed by both the contracting parties. The affidavit produced in answer to the application, expressly states that the plaintiff had refused to execute the deed. He, therefore, can have no interest in it; but where two or more parties have a joint interest in the same deed, we may make an order for its production, as the person who has it, holds it as trustee for the others; but we cannot extend our jurisdiction: and we might work great injustice by yielding to motions of this description. If application be made to a Court of Equity, for the production or inspection of deeds or papers, those required are left with one of the Masters, where the applicant may see them, or obtain copies of them; but, even then, he must have an interest in them. In *Pickering v. Noyes*, (a) the Court of *King's Bench* asked whether there was any case where a deed had been ordered to be produced, unless it had been deposited in the hands of the holder as a trustee for others only, or for others jointly with himself: and would not compel the production of deeds in which both parties had not an interest.

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**Mr. Justice GASELEE.**—I cannot accede to the position that the Court has a general jurisdiction to compel suitors to do what it may think right for the purposes of justice. In *Street v. Brown*, Lord Chief Justice *Gibbs* said (b): “We must look to the principle on which the cases in which the Courts have granted an inspection were decided,” *viz.* where, one part only of a deed being executed, the party holding it is a trustee for the other. So, when a party has an interest in a deed, he has a right to inspect it, as in *Bateman v. Phillips*; but here, the

(a) 1 Barn. & Cress. 262; S. C. 2 Dow. & Ryl. 386.

(b) 1 Marsh, 612.

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plaintiff has no interest whatever in the deed he wishes to inspect. The draft of the articles of partnership was a mere parol agreement; but, as it was drawn or prepared by the defendant's attorneys, and handed over to the plaintiff, and, having been perused and approved of by him, afterwards returned to the defendant's attorneys, it may be considered as the agreement of both, in which each has an interest, as it stated the terms whereon the deed of co-partnership was to be drawn up; but as that deed, as prepared by the defendant, differed from the draft supplied by the plaintiff, he refused to execute it. He, therefore, can neither be bound by that deed, nor can he have any interest in it; and the only use he could make of it, would be, to shew that it did not contain the terms agreed on in the draft. As, therefore, the plaintiff repudiated the deed, he cannot require it for the purpose of declaring, nor has he such an interest in it as to entitle him to call for its production. That part of the rule, therefore, which relates to the draft of the articles of co-partnership, must be made—

Absolute.

And that as to the deed, must be—

Discharged.

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**COMBE and Others v. CUTTILL.**

By the practice of this Court, a second; or *alias scire facias* may be tested on, and issued before, the *quarto die post* of the return of the first, provided there be fifteen days between the *testis* of the first writ, and return of the second; and *Sunday*, unless it be the last day, is reckoned as one of the four which must elapse between the return of the second writ, and the day of signing judgment.

accordingly; and judgment was signed against the bail on the 30th November, although a *Sunday* had intervened between that day and the 25th, when the second writ was returnable; and a *fieri facias* was afterwards sued out on such judgment. Under these circumstances, Mr. Serjeant *Wilde*, in the last Term, applied for a rule, calling on the plaintiffs to shew cause why the proceedings against the bail should not be set aside for irregularity, when the Court ordered it to be referred to the Prothonotary to ascertain the practice as to whether or not the second writ had been regularly issued; and directed him to make his report thereon, and that the proceedings should in the mean time be stayed.

Mr. Serjeant *Vaughan* having now moved for the report—

Mr. Prothonotary *Watlington* stated, that he had considered the question very attentively, and that he found that it was the practice sometimes to teste the second or *alias scire facias*, on the return day of the first, and sometimes on, and sometimes before, the *quarto die post*; and that he was of opinion that a plaintiff would be correct in pursuing either course. He also stated that the signing of the judgment was regular, notwithstanding that one of the days between the return of the *alias*, and the day of signing it, was a *Sunday*, as that day is always accounted one, unless it be the last.

Mr. Serjeant *Wilde*, for the bail, objected to the report. The proceedings of the plaintiffs were clearly irregular, as well in the issuing of the *alias scire facias*, tested on the return-day of the first, instead of on the *quarto die post*,—as also in their having signed judgment too soon, there not having been four clear juridical days between the return of the *alias scire facias* and the day of signing judgment.

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*First*, the *alias scire facias* should not have been tested until the *quarto die post* of the return of the first; which is the universal and established practice of the Court. In *Tidd's Practice* (a), it is said, that, in this Court, "when there are two writs of *scire facias*, the second should be tested on the *quarto die post* of the return of the first; except in error, or unless the return day happen on a *Sunday*." So, in *Impey's Practice* (b), it is said, that the teste of the *alias* must be on the *appearance day* of the return of the first *scire facias*. In *Petersdorff on Bail* (c), it is said, that two *nihil*s are equivalent to a return of *scire feci*. It therefore follows that the *alias scire facias* must be tested on the *quarto die post* of the return day of the first; as, upon a *scire feci*, the plaintiff must give a four day rule for judgment; and, if the *alias*, on a return *nihil*, be equivalent to a return of *scire feci*, the *alias* ought not to issue before the rule on the first writ, and *scire feci* returned, would have expired. Besides, when the first *scire facias* is returnable, it is necessary to give a four-day rule to appear (which was given in this case on the 19th *November*); and, if an appearance were entered within the four days, it would be unnecessary to sue out the second or *alias* writ. In proceedings against bail, the Courts have always required the greatest possible precision, and a strict attention to established rules. The *alias scire facias*, therefore, should not have issued until after default of appearance to the first writ. Besides, if the *alias* may be tested on the return day of the first, inasmuch as such return day (except in leap-year) is generally a *Sunday*, it would be bad, as a *teste* on that day would be irregular and void.

*Secondly*. — Judgment was, under the circumstances, prematurely signed. In *Wathen v. Beaumont* (d) a rule was given by the plaintiff, on *Saturday* the 6th of *May*, to the defendants, the bail, to appear and plead to a writ

(a) 7th Ed. 1162.

(b) C. P. 6th Ed. 487, 492.

(c) 376-7.

(d) 11 East, 271.

of *scire facias*, otherwise judgment would be signed; and, default being made, judgment was signed on *Friday* the 12th (*Thursday* being a *dies non*); and, after reference to the master, the Court of *King's Bench* held the practice to be, in all rules for pleading against bail in *scire facias*, to exclude *Sundays* and *holidays* from the computation of time given, though not happening on the last day; and, in *Roberts v. Quickenden* (a), that case was explained, as not meant to extend the like mode of computation to rules for pleading in actions in general, and the practice was thus stated, *viz.*: "In rules to plead, in actions in general, a *Sunday* or *holiday* reckons as a day, except it be the last; but, in rules for judgment, a *Sunday* or a *holiday* does not reckon, though it be not the last day: and, in proceedings in *scire facias* against bail, the rules for pleading are assimilated to, and operate in this respect as, rules for judgment, and are entered as such in a separate book in the office." The rule on the *scire facias* is a rule for judgment, and the proceedings on such rules are the same in all the Courts; and, therefore, these cases, although decisions of another Court, not being inconsistent with the practice of this, will be found strictly applicable to the present case; for the principle in rules for judgment is universal, that a party against whom such rule is obtained, may have an opportunity of coming into Court, on each of the four days, to shew cause; which he would be prevented from doing, if either of those days were a *Sunday* or *holiday*.

**Lord Chief Justice BEST.**—No reason can be assigned for several of the points of practice laid down by the Courts; but when they have been established and acted upon, we must adhere to them; for the practice is the law of the Courts, and, as such, is a part of the law of the land. The Prothonotary has reported to us that the course which

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has been pursued by the plaintiffs in this case, is not irregular; but that, in accordance with the established practice of this Court, an *alias scire facias* may be tested on the return day of the *scire facias*, and issued before the *quarto die post* of the return day; and no case has been cited to us, impugning the correctness of that report. Although in the Court of *King's Bench*, by original, fifteen days (inclusive) are required between the *teste* and the return of the *alias*, as well as the first writ of *scire facias*; yet, in this Court, as in the *King's Bench*, by bill, the practice only requires that there be fifteen days between the *teste of the first*, and the *return of the second*; which the bail have had. As to the signing judgment, the usual course here has always been, to reckon *Sunday* as one of the four days allowed for that purpose, unless it be the last. The case of *Creswell v. Green* (a), appears to me to be at variance with that of *Wathen v. Beaumont*; for it was there held, that an intervening *Sunday* is to be reckoned as one of the eight days in full term given to bail to render their principal after the return of the writ. That, however, depended on the construction to be put on a rule of Court; and Lord *Ellenborough* there said, the practice, being settled, ought not to be varied. The report of our officer must, therefore, govern our decision.

Mr. Justice PARK.—It is most desirable to have the practice of the *King's Bench* and this Court made conformable to each other. I was fully aware of the case of *Wathen v. Beaumont*; but, as our officer has reported to us that the rule in this Court is different, and that these proceedings have been regular, and according to long and established practice, it would be too much for us to interfere, unless an authority for so doing had been shewn us.

**Mr. Justice BURROUGH.**—We are bound to adhere to the practice of the Court, and cannot alter it without some decision authorising us to do so; and here the report of the Prothonotary must be considered as conclusive.

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**Mr. Justice GASELEE.**—As the officer of the Court has reported that a second or *alias* writ of *scire facias* may be tested and issued before the *quarto die post* of the return of the first, I feel myself bound by such report; though it seems to me to be contrary to principle and common sense, that a party should have four days to appear after the return of the first writ, and yet, that a second may issue before those four days have expired. With respect to the objection as to the judgment having been signed too soon, it is not entitled to any weight, as the practice of the Court is clear on that point; and it appears to be as well understood here as in the *King's Bench*. In this Court the *Sunday* is not reckoned as one of the four days, unless it fall on the last day; whilst there, an intervening *Sunday* is not in any case reckoned as one of such days.

Rule discharged without costs.

DAVIES, and three Others *v.* ARNOTT, HASKINS, and SHEPPARD.

*Friday,*  
*June 17th.*

THIS was a *scire facias*, on a judgment obtained by the plaintiffs in an action on a bastardy-bond, brought to recover the sum of 9*l.* 12*s.* 6*d.*, paid by the plaintiffs, as churchwardens and overseers of the parish of *Christ-church Surrey*, for *fifty-five* weeks' maintenance of a bastard child, of which the defendant *Arnott* was the

The putative father of an illegitimate child, entered into a bond with two sureties, to the overseers of a parish, to indemnify them against the expenses of providing for the

child, and default having been made by the father, judgment was entered up on the bond, and the sureties were afterwards discharged under the Insolvent debtor's act:—Held, that they were still liable to the overseers, in *scire facias* on the judgment, for expenses incurred by the parish in respect of the child, subsequently to their discharge.

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reputed father, at the rate of 3*s.* 6*d.* per week, from the 25th *March* 1824, to the 16th *April*, 1825.

The declaration stated.—That the plaintiffs, churchwardens and overseers of the poor of the parish of *Christ-church*, in the county of *Surrey*, for the time then being, theretofore, to wit, in *Trinity Term*, 5 *Geo. 4.*, recovered, by the judgment of this Court, against the three defendants, a certain debt of 200*l.*, and also 47*l.* 10*s.*, for their damages, which they had sustained, as well by reason of the detaining of the said debt, as for their costs and charges by them about their suit in that behalf expended; which judgment, so recovered against the defendants, was had and obtained upon a certain writing obligatory, dated the 13th *November*, 1820, whereby the defendants acknowledged themselves to be held and firmly bound to the churchwardens and overseers of the poor of the said parish of *Christ-church*, in the sum of 200*l.*, to be paid to them, or their successors for the time being; which writing obligatory was subject to a certain condition thereunder written; whereby—after reciting that one *Ann Stone*, of the said parish of *Christ-church*, single woman, was, on the 30th *January*, 1818, delivered of a male bastard child in that parish, and that the defendant *Arnott* was the father of such child—it was declared, that, if the defendants, or any or either of them, did and should, from time to time, and at all times thereafter, fully and effectually save harmless and keep indemnified, as well the plaintiffs, as all future churchwardens and overseers of the said parish, as also all and every the inhabitants and parishioners thereof, of, from and against all costs, charges, damages or expenses, which should or might arise, happen, or be charged or imposed on the churchwardens, overseers, or parishioners, or any or either of them, for or by reason or means of the birth, maintenance, clothing, educating, or bringing up the said child; and also should and would, when they, or

any or either of them, should be thereunto required by the churchwardens and overseers for the time being, appear before a Justice of the Peace, and upon oath, before such Justice, discover and declare how such child was provided for and maintained, or, in case of his death, the time and place of his burial ;—then the obligation was to be void and of no effect. It was then averred, that the plaintiffs, by their declaration in the said suit, assigned a certain breach of the condition of the said writing obligatory, according to the form of the statute &c. (a), to wit, that, although the child whereof the defendant *Arnott* was the reputed father was then living, nevertheless that the defendants did not nor would, nor did nor would any or either of them, from time to time, or at any time after the making of the said writing obligatory, fully or effectually save harmless or keep indemnified the churchwardens and overseers of the poor of the said parish for the time being, or the inhabitants or parishioners of the said parish, of, from and against all costs, charges, &c., arising, happening, growing, and charged and imposed upon them, for or by means of the birth, maintenance, and clothing of the said child, according to the said condition of the said writing obligatory ; and that, by reason thereof, the churchwardens and overseers of the poor of the said parish, and the said parishioners and inhabitants thereof, for the time being, from time to time, after the making of the same writing obligatory, to wit, on the said 13th November, 1820, and on divers other days and times between that day and the day of the commencement of the said suit against the defendants, were forced and obliged to, and did necessarily, lay out and expend divers sums of money, in the whole amounting to the sum of 70*l.*, for, in, and about, the maintenance, clothing, educating, and bringing up the said child ; and thereby sustained damages to the amount of the said sum

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of 70*l.*, and damages were thereupon assessed for and by reason of the said breach so assigned:—And further, that it had been and was duly suggested by the plaintiffs, the churchwardens and overseers of the poor of the said parish of *Christ-church* for the time being, as and by way of another and further breach of the condition of the said writing obligatory, than the said breach so assigned as aforesaid, that, although the child whereof the defendant *Arnott* was the reputed father, at the time of such further suggestion, was and still is living; nevertheless, that the defendants have not, nor have either of them, from time to time, since the recovery of the said judgment, fully or effectually saved harmless or kept indemnified the churchwardens and overseers of the poor of the said parish for the time being, or the inhabitants or parishioners thereof, of, from, and against, all costs, charges, &c., arising, charged, or imposed upon them, for or by reason of the birth, maintenance, and clothing of the said child, according to the condition of the said writing obligatory; and that, by reason thereof, the churchwardens and overseers of the poor of the said parish, and the inhabitants and parishioners thereof, for the time being, from time to time, since the recovery of the said judgment, to wit, on the 24th *June*, 1824, and on divers other days and times between that day and the time of suggesting such further breach, were forced and obliged to, and did necessarily, lay out and expend divers sums of money, amounting in the whole to the further sum of 50*l.*, for, in, and about, the maintenance, clothing, educating, and bringing up of the said child, and had sustained further damages to the amount thereof, contrary to the form and effect of the said condition of the said writing obligatory; for which last-mentioned breach of the aforesaid condition, the plaintiffs had humbly besought his Majesty to provide them a proper remedy, and that the sheriff should be commanded that he should make known to the defendants, that they should be here on &c., to

shew cause why execution should not be awarded against them, upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the last-mentioned breach of the condition of the said writing obligatory, if &c.; and further &c. To this the sheriff returned, that the defendant, *Arnott*, had not any thing in his bailiwick whereby he could give him notice, as by the writ he was commanded.

The defendant, *Haskins*, pleaded—That since the recovery of the said judgment, and after the incurring of the said other and further breach, and the sustaining of the said further damages, and every part thereof, by the said churchwardens and overseers of the poor, and parishioners and inhabitants of the said parish, and before the suing out of the said writ of *scire facias*, to wit, on the 11th *October*, 1824, by a certain order then duly made by the Court for the relief of insolvent debtors, according to a certain act of Parliament, made and passed in the first year of the reign of King *George* the Fourth, intituled, &c. the said *Haskins* was duly discharged from the said other and further breach, and the said damages so sustained by the said churchwardens and overseers of the poor, and the said parishioners and inhabitants of the said parish, since the recovery of the said judgment as aforesaid; and which discharge remained in full force. And this &c., wherefore &c.

The defendant, *Sheppard*, pleaded—That, theretofore, to wit, on the 5th *July*, 1824, he, the said *Sheppard*, was in actual custody, in the *Fleet* prison, within the meaning of a certain act of Parliament, made and passed in the first year of the reign of King *George* the Fourth, intituled, &c., and that the debt in the declaration mentioned, and the causes of action (if any) thereupon, arose and accrued against him, the said *Sheppard*, before he was in custody as aforesaid; and that, by a certain order made by the Court for the relief of insolvent debtors in *England*, on,

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and bearing date the 8th *October*, in the year aforesaid, he, *Sheppard*, was duly discharged according to the said act; and was also thereby discharged from the said causes of action (if any); and that the discharge still remained in full force. And this &c., wherefore &c.

The plaintiffs replied to *Haskins's* plea—That the said further or other breach in the said writ of *scire facias*, and declaration thereon founded, was committed, and the damages thereby occasioned were sustained by the said churchwardens and overseers of the poor, and the said parishioners and inhabitants of the said parish, as in the said writ and declaration thereon founded is mentioned, after the making of the said order in the said plea mentioned; and that, by such order, the said *Haskins* was not discharged from the said further and other breach, and the said damages so sustained by the said churchwardens and overseers of the poor, and the said parishioners and inhabitants of the said parish, since the recovery of the said judgment as aforesaid, or any part thereof, in manner and form as the said *Haskins* had above in his said plea in that behalf alleged. On which issue was joined.

To *Sheppard's* plea, the plaintiffs, after protesting that it was wholly bad and insufficient in law; nevertheless, for replication thereto in that behalf, said, that the said further or other breach in the said writ of *scire facias*, and declaration thereon founded, was committed, and the damages thereby occasioned were sustained by the said churchwardens and overseers of the poor, and the said parishioners and inhabitants of the said parish, as in the said writ and declaration was mentioned, after the making of the said order in the said plea mentioned; and that by such order the said *Sheppard* was not discharged from the said further and other breach, and the said damages so sustained by the said churchwardens and overseers of the poor, and the said parishioners and inhabitants of the said

parish, since the recovery of the said judgment as aforesaid, or any part thereof. Whereupon issue was also joined.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the adjourned Sittings after the last Term, the plaintiffs proved that they had made payments on account of *Arnott's* child, at the rate of 3*s.* 6*d.* per week, from the 25th *March*, 1824, to the 16th *April*, 1825. The defendants, *Haskins* and *Sheppard*, (*Arnott* having suffered judgment by default) produced their several discharges under the insolvent debtor's act, (1 *Geo. 4*, c. 119), the one bearing date on the 11th of *October*, 1824; and in his, *Haskins's*, schedule there was stated to be a debt of 200*l.*, being the penalty of a bond given by the insolvent, *Haskins*, jointly with the two other defendants, to the churchwardens and overseers of *Christ-church*, for the payment of a weekly sum of 3*s.* 6*d.* for the maintenance of a bastard child of *Arnott's*; and *Sheppard* produced his discharge, dated the 8th *October*, 1824, and his schedule, in which the penalty in the bond was also included; when it was insisted for them, that they were discharged from all further liability on the bond. A verdict, however, was taken for the plaintiffs, for such damages only as had accrued since the discharge of the defendants, his Lordship reserving leave to them to move to set it aside, and that a verdict might be entered for them instead thereof, in case the Court should be of opinion, that their discharge under the insolvent act exempted them from all further liability on the bond.

Mr. Serjeant *Onslow*, for the defendant *Sheppard*, and Mr. Serjeant *Wilde*, for the defendant *Haskins*, having, accordingly, on the first day of this Term, obtained rules *nisi*—

Mr. Serjeant *Taddy*, and Mr. Serjeant *Pell*, now shew-

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ed cause.—The question in this case depends chiefly on the statute 1 Geo. 4, c. 119, s. 10 (*a*), by which the bond-creditors of an insolvent are entitled to receive a dividend of the insolvent's estate, in such manner, and upon such terms and conditions as such creditors would have been entitled to, if the insolvent had become bankrupt. That statute, therefore, must be construed and taken with analogy to the bankrupt laws; and if this were a case of bankruptcy instead of insolvency, the case of the overseers of *Saint Martin's-in-the-fields v. Warren* (*b*), would be directly in point. There, one of the sureties in a bastardy-bond, after the bond had been forfeited, became bankrupt, and obtained his certificate; and it was held, that the parish officers were not thereby precluded from recovering upon the bond further expenses, incurred subsequently to the bankruptcy;—on the ground that such expenses were in the nature of a contingent debt, incapable of valuation, and, therefore, not proveable under the commission. The penalty of a bond is not a debt proveable under a commission; for the statute (21 Jac. 1, c. 19, s. 9) express-

(*a*) By which it is enacted, “That all and every creditor and creditors of any prisoners, for any sum and sums of money payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, may be and shall be entitled to be admitted a creditor or creditors, and shall be entitled to receive a dividend or dividends of the estate of such prisoner, in such manner and upon such terms and conditions as such creditor or creditors would have been entitled unto, by the laws now in force, if

such prisoner had become bankrupt; the amount upon which such dividend shall be calculated, and the terms and conditions on which the same shall be received, being first settled by the Court; and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made, in respect thereof, by a creditor under a commission of bankruptcy, and a certificate obtained by the bankrupt under such commission.”

(*b*) 1 Barn. & Ald. 491.

ly provides, that “ creditors having securities by judgment, or specialty with or without penalty, &c., shall not be relieved upon such judgment, &c., for any more than a rateable part of their just and due debts, with the other creditors of the bankrupt, without respect to any such penalty.” Although the penalty is, therefore, for some purposes, the legal debt; it is not so for the purpose of proof under a commission of bankruptcy, or in a case of insolvency; and *a fortiori*, in an action against the obligors of a bastardy-bond; as all that could be proved in the one case or the other, was the just and true debt then due, which, in the present instance, was the amount of the expence then actually incurred in the maintenance of the child; and by such proof the bond is not entirely discharged, but only *pro tanto*, and expences subsequently incurred are clearly the proper subject of an action, or proceeding by *scire facias*. In *Cole v. Gower* (a), it was decided, that the statute, 6 Geo. 2, c. 31, only authorises parish officers to take security from the putative father of a bastard child to *indemnify* the parish; and, therefore, where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum as the amount of the charge actually sustained by the parish, which tender was found for the defendant—it was held, that the plaintiffs could not recover further upon the note. The penalty of the bond, therefore, is not the debt in law; and here the instrument was given as a mere security to indemnify the parish against future expences, which might be incurred by providing for *Arnott's* child, which were wholly incapable of valuation, as their amount depended on the life of the child, the continuance of its health, and the ability of the father to support it. An annuity could not be proved until after the passing of Sir *Samuel Romilly's* act (49 Geo. 3, c. 121), unless it were secured by a bond,

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or other instrument, with a penalty; but by the 17th section of that statute, it is competent to any annuity-creditor to prove, under a commission of bankruptcy against his debtor, the value of the annuity, whether it be secured by bond, covenant, or other assurance; but, even then, the penalty is not the subject of proof, but only the value of the annuity, provided it be less than the penalty. It is necessary that a debt should either be actually liquidated and ascertained, or capable of being so, before it can be proved under a commission. In *Goddard v. Vanderheyden*, the Court said (a), "if *A.* has a bond of indemnity from *B.*, and the condition be broken, and afterwards *B.* becomes bankrupt before *A.* has been sued or damnified; though *A.* had a good cause of action against *B.* before the act of bankruptcy, yet, as *A.* had not been damnified by paying any certain sum of money by reason of *B.*'s breach of the condition, *A.* cannot possibly swear to any debt due and owing from *B.* at the time of the act of bankruptcy. Debts payable upon a contingency, which may possibly never happen, cannot be proved under a commission of bankrupt." So, in *Chilton v. Whiffin* (b), it was decided, that where the breach of a bond of indemnity is *after* a bankruptcy, the bond is not discharged. Indeed the Courts have uniformly held, that, unless a surety had actually paid the debt before the bankruptcy of the debtor, he could not prove under a commission against him, as no debt existed between them until he had paid the money; and, therefore, that it rested in contingency. In *Millen v. Whittenbury* (c), it was held, that a bankrupt's certificate is no bar to an action of *assumpsit*, on a promise to pay a weekly sum to the plaintiff for the support of an illegitimate child she had by the bankrupt; and Lord *Ellenborough* there said: "If any arrears accrued before the bankruptcy, the certificate will be a

(a) 3 Wils. 270.

(b) Ibid. 16.

(c) 1 Camp. 428.

discharge as to these; for the plaintiff might have proved them under the commission: but, could she have set an aggregate value upon the defendant's promise to allow her a weekly sum for the maintenance of the child, and received a dividend for that?—As no proof, in respect of the *subsequent arrears*, would have been admitted under the commission, I am of opinion, that the defendant is still liable for them in this action."—The judgment which was obtained in this case, was not for the penalty of the bond, but only for expenses incurred up to the time of the action; and, as the bond was conditioned for the payment of contingent damages, the judgment has reference to such damages; and if so, it falls expressly within the provisions of the statute, 8 & 9 Wm. 3, c. 11, s. 8 (a), as

(a) By which it is enacted, "That in all actions, which, from and after the 25th March, 1697, shall be commenced or prosecuted in any of his Majesty's Courts of Record, upon any bond or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff upon the trial of the issues shall prove to have been broken; and that the like judgment shall be entered on such verdict, as heretofore hath been usually done in such like actions; and in case the defendant or defendants, after

such judgment entered, and before any execution executed, shall pay unto the Court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or, if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding, in

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neither the judgment, nor the penalty of the bond, constituted a debt; but the judgment merely stood as a security for the recovery of future expenses; and the 28th section of the statute, 1 Geo. 4, c. 119, contains a proviso, "That it shall be lawful to proceed against any prisoner discharged, upon any judgment obtained, and which could not have been put in force against him at the time of his obtaining his discharge." Coupling, therefore, these two sections together, and considering that the parish has been damaged, since the obligors on the bond were discharged under the Insolvent Debtor's Act, and as every *scire facias* is a new cause of action, the plaintiffs are entitled to recover the expenses incurred by the parish since the discharge; for the judgment on the bond could not have been put in force at the time of such discharge, as it could only operate *quoad* the expenses then incurred.

Mr. Serjeant *Onslow*, and Mr. Serjeant *Wilde*, in support of their rules.—*Arnott*, the principal in the bond, and reputed father of the child, having let judgment go

each case such judgment shall remain, continue, and be as a further security, to answer to the plaintiff and plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained, upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment, against the defendant or against his heir, terrenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively, to shew cause why execution

shall not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond of obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof, upon a writ to be awarded in manner as aforesaid; and that, upon payment or satisfaction in manner as aforesaid, of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

by default, the two other defendants, as his sureties, can only be liable by strict rules of law, and the Court will be inclined to favour them by every means in its power; but they are released from all further claims that might arise in respect of the bond, as well by law as by the 28th section of the statute, 1 Geo. 4, c. 119 (a). The cause of action accrued to the plaintiff's before the defendants were in custody, and their discharge under the Insolvent Debtor's

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(a) S. 28, by which it is enacted, "That, after the said Court shall have declared any prisoner to be entitled to the benefit of this act as aforesaid, no writ of *scire facias* shall issue on any judgment before then obtained against such prisoner, for any debt contracted, or cause of action arising, before the time of the commencement of such actual custody as aforesaid, except upon the judgment entered up by order of the Court as aforesaid; and that, if any *scire facias*, or action of debt, or any other suit or action, shall be brought against any prisoner, his or her heirs, executors, or administrators, upon any judgment obtained against any such prisoner, or any statute or recognition acknowledged by him or her, or any other cause of action arising, before the commencement of such actual custody, by virtue of this act, except upon the judgment entered up against such prisoner, under the order of the Court as aforesaid, it shall and may be lawful for any such prisoner, his or her heirs, executors, or administrators, to plead generally, that such prisoner was duly discharged, according to this act, by the order by which such discharge shall

have been obtained, and that such discharge remains in force, without pleading any other matter specially; whereto the plaintiff or plaintiff's shall or may reply generally, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such prisoner was not duly discharged according to the provisions of this act, in the same manner as the plaintiff or plaintiff's might have replied in case the defendant or defendants had pleaded this act, and his discharge by virtue of this act, specially; and if the plaintiff or plaintiff's be nonsuited, discontinue his or her action, or verdict pass against him, her, or them, or judgment shall be had on demurrer, the defendant or defendants shall have double costs:— provided always, that it shall be lawful to proceed against any prisoner so discharged, upon any judgment, recognition, or other security obtained or given, and which could not have been put in force against such prisoner at the time of his obtaining such discharge; any thing in this act contained to the contrary notwithstanding."

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Act must, consequently, operate as a bar to this suit.—There is a wide distinction between a proceeding on a judgment, and a recognizance; and here, the judgment was the sole cause of action. The *scire facias* was brought to revive it; and, therefore, it did not arise subsequently to the judgment. In *Wright v. Nutt*, where executors, against whom a *scire facias* was sued out to recover damages assessed, on an interlocutory judgment, against their testator before his death, brought a writ of error, Mr. Justice *Ashhurst* said (*a*), “This is not a *new action*, but a continuation of the old one; it is only a *scire facias* to revive the former judgment.” That, too, was a proceeding against executors, whilst here, the parties themselves were taken in execution under the judgment. Although it has been said, that, under the statute 21 Jac. 1, c. 19, the true debt alone can be proved under a commission of bankruptcy, and not the penalty of a bond, yet the forfeiture of the bond is the foundation of the proof; and previously to the statute 49 Geo. 3, an annuity could only be proved by virtue of the penalty of the bond or other instrument under which it was secured. The distinction is, that, if a bond be given with a penalty, and there be a forfeiture of the penalty, at law, before the bankruptcy, the bond may be proved under the commission. The case of the overseers of *St. Martin v. Warren*, does not apply, as there no judgment had been obtained on the bond, which still remained in full force. Although, if a covenant be in its nature contingent, and the contingency has not taken place at the time of the bankruptcy, it cannot be proved under a commission; yet, if it be secured by a penalty, it may; for, in *Ex parte Mare* (*b*), where there was a covenant by a trader, within seven years, or when requested, to convey lands of a given value in particular counties, and the trader became a bank-

(*a*) 1 Term Rep. 389.(*b*) 8 Ves. 335.

rupt after the expiration of the seven years, and no request was made to convey the lands, although proof was not admitted on the covenant, yet, the Lord Chancellor said, that there would have been no doubt, if there had been a penalty, but that the party might have proved. So here, the penalty of the bond was the legal debt; and, consequently, the bond was discharged as against the sureties; particularly as the plaintiffs recovered a judgment against them, on which the present proceeding is founded: so that no new cause of action has accrued subsequently to that judgment. If a surety, bound with his principal for payment of money by instalments, take a bond from the principal, conditioned for the payment of the amount of the instalments, before the first of them will be due, and before that time the principal become bankrupt and obtain his certificate, and afterwards the instalment bond be discharged by the surety, although he cannot maintain an action against the principal for money had and received to his use, according to the case of *Toussaint v. Martinnant* (a), yet, as Mr. Justice *Ashhurst* there said, "the penalty of the bond became a legal debt, and as soon as that was forfeited the plaintiffs became creditors of the bankrupt, and might have proved their debt under the commission,"—on the principle, that the bond, or counter-security, created an absolute debt at law, for which a sufficient consideration was created by the liability of the surety, and that the forfeiture was the ground of proof. So, in *Martin v. Court* (b), it was held, that, if a person be bound with a trader, as a surety for the payment of a sum certain, and take an absolute bond from the latter, payable the day before the original bond would become due, and the trader become bankrupt before the day of payment, the surety might prove the bond as a debt under the commission. In *Hodgson v. Bell* (c), it was decided, that

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if an indemnity bond be forfeited before the bankruptcy, the surety is entitled to prove his bond, although he paid no part of the sum for which he was surety, until after the bankruptcy; and Lord *Kenyon* there said: "If *any part* of the condition of the bond were broken before the defendant's bankruptcy, the bond was forfeited at law, and the plaintiffs might have come in and proved under the defendant's commission." So, here, the condition was, *in part*, broken before the defendants became insolvent, and judgment was entered accordingly, and they were afterwards relieved from all further claims on the bond, they having obtained their discharge under the Insolvent Debtor's Act. In *Ex parte Day* (*a*), it was held, that, although a bond to secure the re-transfer of stock and the payment of dividends, did not necessarily constitute a debt proveable under the commission; yet, that, if the bond were forfeited before the bankruptcy, the creditor should be permitted to prove for the amount of the dividends due before the bankruptcy, and the value of the stock at the date of the commission—by analogy to the case of annuities. That case bears strongly on the present. In *Ex parte King* (*b*), upon a petition to prove, under a commission, on a bond to replace stock and pay the dividends, Lord *Eldon* said: "It has often been determined in bankruptcy, that, if the condition is broken before the bankruptcy, you may prove. If the bond had been forfeited, either as to the capital or the dividend, it would have done; as, if, though the bankruptcy was previous to the time at which the stock was to be replaced, a forfeiture had been incurred by not paying the dividend; and the petitioner might in either case have proved." In *Ex parte Rowlett* (*c*), where a bond was given for the payment of 3000*l.* after the death of the obligor, and for payment of an annuity of 200*l.* a year in the mean time, the annuity not being duly

paid, the penalty was held to attach, and the obligee entitled to prove the £3000*l.* under the obligor's commission; and Lord *Eldon* there said: "Whatever be the contingency, if the penalty is forfeited, equity will arrange the proof, upon the footing that there is a debt at law." So, here, whether the child might live or not, depended on a contingency; but the penalty of the bond having been forfeited by a breach of the condition before the imprisonment of the insolvents, they were released from all further claims by their discharge under the act. In *Ex parte Winchester* (*a*), a father gave a bond to his intended son-in-law, on the marriage of his daughter, to pay a sum of money after his death, and interest upon particular days during his life, and there was a breach of the condition of the bond by non-payment of interest, and the father became a bankrupt; it was held, that such bond might be proved under the commission; as, by the breach of the condition, it was a legal debt at the time of the bankruptcy; and in *Ex parte Cockshott* (*b*), a bond having been given by a trader to indemnify another who had become his surety, and the bond being forfeited before the bankruptcy of the former, the surety was held entitled to prove the whole of his bond, although part was paid by him before the commission issued, and part afterwards,—on the ground, that, the condition having been broken before the bankruptcy, the surety had a right to prove the whole of what he had paid.

[Lord Chief Justice *Best*.—It is not necessary to dispute the authority of these cases, as they do not bear on this question. In all those, there was an absolute or saleable debt; but the bond in question is merely a bond of indemnity, depending on a contingency, wholly incapable of valuation, and which the parish officers could not sell.]

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(a) 1 Atk. 116.

(b) 3 Brown's Chan. Cas. 502. S. C. Cooke's Bkpt. Laws, 6th Ed. 163.

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A bail-bond is not given to pay a certain sum, nor is it a security for a debt, but is conditioned for the performance of a mere collateral act, *viz.* the appearance of the defendant in the cause, according to the exigency of the writ; and yet, if it be forfeited before the bankruptcy, it is proveable under the commission, *Hewes v. Mott* (*a*): and in *Coulson v. Hammon* (*b*), where a commission of bankrupt issued against one of the bail to the sheriff after the *quarto die post*, it was held, that the penalty of the bond was a debt proveable under the commission, and, therefore, barred by the certificate. In *Shutt v. Procter* (*c*), this Court stayed the proceedings in an action on a bastardy-bond, on payment of the penalty and costs, although it was urged, on the authority of *Cole v. Gower* (*d*), and *Townson v. Wilson* (*e*), that, by so doing, the very mischief contemplated in those cases would be created; and Lord Chief Justice *Gibbs* there said: "The object of the contract is to indemnify the parish, and that object is secured by the penalty. The party who enters into it is interested not to pay the entire penalty, if the damages do not amount to it; but, if he be conscious that they do, it then becomes his interest to pay the penalty, because, otherwise, he would only be incurring further costs." The statute 8 & 9 *Wm. 3*, c. 11, does not prevent a judgment from being proveable under a commission; and the 26th section of the statute 1 *Geo. 4*, c. 119, must be coupled with, and construed as explaining, the 28th, by which it is enacted, "That no prisoner who shall have obtained his discharge under the act, shall, at any time after such discharge, be imprisoned by reason of the judgment entered up against him in the name of the assignee, or of any judgment, or decree, or order obtained for pay-

(*a*) 6 *Taunt.* 329; *S. C.* 2  
Marsh. 37.

(*b*) 2 *Barn. & Cres.* 626.

(*c*) 2 *Marsh.* 226.  
(*d*) 6 *East*, 110.  
(*e*) 1 *Camp.* 396.

ment of money only, or for debt, damages, contempt of any Court by non-payment of money or costs, contracted, incurred, or growing due at the time of the commencement of such actual custody, and expressed in such discharge." The statute 16 Geo. 3, c. 38, s. 33, contained a similar enactment; and in *Cotterel v. Hooke* (*a*), where there was a bond, and also a deed of covenant to secure an annuity, although the bond was forfeited before a discharge under that act, it was held that the party might be sued upon the covenant, for payments becoming due after the discharge; yet, Lord Mansfield said, "The question was, whether, when there was a bond with a penalty, and also a deed of covenant, and the plaintiff made no use of the penalty, he should be barred of his remedy under the deed of covenant? That he took the case of a bankrupt and insolvent debtor (as to this point) to be the same. That, when a man has two remedies, he may elect; and that, if the plaintiff had made use of the penalty, the case would have been different." As, therefore, there are several contingent claims which may be proved under a commission of bankrupt, and as the case of an insolvent may be assimilated to that of a bankrupt; and as the expenses attending the maintenance of a bastard child are equally susceptible of valuation, and are not more a matter of contingency than the future payments of an annuity, particularly as the penalty in a bastardy-bond is the debt in law, the defendants in this case, as sureties, were released from all further liability, when they obtained their respective discharges under the statute 1 Geo. 4, c. 119.

Lord Chief Justice Best.—Even if the counsel for the defendants could have satisfied us, that they would have been discharged by bankruptcy and certificate, it would

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have fallen far short of proving, that they were discharged under the provisions of the Insolvent Debtor's Act. That act alone must be looked at in the present case, and on it I found my judgment; for, if that statute do not exonerate them from every claim in respect of the bond, the bankrupt laws cannot avail them, to control the operation of the statute under which they now seek to be relieved. But I am not satisfied that they would have been discharged, if they had become bankrupts and obtained their certificates. This case must be governed by established principles: and in *Cole v. Gower*, it was decided, that, although parish officers might take security from the putative father of a bastard child, to indemnify the parish, yet, that they could not take a gross sum, or a security for a specific sum, in lieu of such indemnity. It therefore follows, that a claim for future contingent expenses, in respect of such a bond as the present, could not have been proveable under a commission of bankrupt. In that case, Lord *Ellenborough* considered a promissory note, which had been taken for a sum certain, to be void on principles of public policy, and said: "Considering the security as given to the parish officers only in their individual capacity, it is giving them a temptation to deal with negligence, at least, in that most important trust, the care of children of tender age, which is committed to them. But, if made to them in their representative character, and the parish were to receive the benefit of the money when recovered, which was the manifest intention of the parties, it is placing parish officers in a situation which the legislature did not mean to do, and which public policy forbids. The law did not mean to make this a matter of speculation of loss or gain to the parish. The parish officers are not to speculate, but to take the security, as a matter of

public duty, in the form prescribed by the act." And Mr. Justice *Grose* said (*a*): "In considering the security, as a security for a certain sum payable at all events, it is illegal. The persons to whom it was given are the parish officers, upon whom a duty is thrown by law, and authority given to them to take security for indemnifying the parish against the charge of maintaining bastard children. They cannot, therefore, convert a power given them for the mere purpose of indemnity, into a matter of bargain and speculation upon the life and death of the child, thereby making it the interest of the parish to get rid of the child as soon as possible."—That reasoning is particularly applicable to this case, as it shews that parish officers are only entitled to take a security to *indemnify* the parish, which they cannot convert into an absolute debt; and, if so, they have no certain or saleable property in such a claim, which could be proveable under a commission, and a certificate, therefore, would be no bar. In all the cases where an interest, although contingent, has been allowed to be proved under a commission, the interest has been a *saleable* interest. The authorities, therefore, which have been referred to, and relied on for the defendants, are inapplicable to the present question, or, at all events, distinguishable from it. But the case of the Overseers of *St. Martin-in-the-fields v. Warren* appears to me to be expressly in point, and decisive as to the present claim. There, the obligee in a bastardy-bond, after the bond had been forfeited, became bankrupt, and obtained his certificate; and it was held, that the parish officers were not thereby precluded from recovering upon the bond further expenses incurred subsequently to the bankruptcy. The bond was dated on the 6th *July*, 1812, and the defendant pleaded, that he became bankrupt on the 28th *November*, 1815, and that the cause of action accrued be-

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fore he so became bankrupt, on which issue was joined ; and that the bond was executed by the defendant, as a security to indemnify the parish from all costs which might be incurred on account of the maintenance and provision of a bastard child; and Lord *Ellenborough* said, "this was a debt upon a contingency, and one too, in its nature, wholly incapable of valuation, and, therefore, in my opinion, not proveable under the commission. The case of an annuity is an exception to the general rule. There, indeed, the Courts have admitted the amount of the contingent debt to be valued and proved; but there you only estimate the duration of life: here, the expenses for which the party is liable may vary, in consequence of the sickness of the child. The contingency is not only the duration of life, but on the continuance of health; it is subject to every accident of human life, and in the most precarious and uncertain events possible, how then could its value be estimated so as to be proved under the commission?"—It has not been attempted to deny the principle laid down in that case, or that it is inapplicable to the present. If, therefore, this had been a case of bankruptcy, it would be no answer to the plaintiff's claim. But, independently of the principles of the bankrupt laws, an insolvent debtor cannot be considered as standing in the same situation as a bankrupt. The words of the Insolvent Debtor's Act are altogether distinct from the operation of the bankrupt laws, and are of themselves decisive of the present question. It is most material to consider the terms of the bond itself; it is conditioned for the payment of uncertain damages, which were to arise out of a future event, or for the liquidation of a future account, and, as such, falls expressly within the provisions of the statute, 8 & 9 Wm. 3, c. 11, s. 8. Now, what is the situation of the obligees under that statute? No absolute or certain debt is due or secured to them. The bond affords no evidence of such a debt, but was taken merely as a security for a contingent

debt or future damages, in case they should accrue. The legislature has taken care, that, when judgment is entered in an action of debt on bond, it is only to remain as a security to answer such damages as may be sustained, and the only effect of a judgment, with respect to such damages, is, that it is in the nature of a lien on the obligor's real property from the time it is signed; for the statute enacts, that, in all actions on bonds, or on any penal sum for non-performance of covenants, &c. the plaintiff may assign as many breaches as he shall think fit; and it is compulsory on him to proceed in the method it prescribes, according to the case of *Drage v. Brand* (*a*). A plaintiff, therefore, under that statute, cannot sue for the penalty in the first instance, but only for the damages he has actually sustained, and, when they have been satisfied, all further proceedings on the judgment are again to be stayed, and no execution can issue until he suggests that fresh damages have accrued, and which suggestion must be entered on the record. It now becomes necessary to see how the Insolvent Debtor's Act, 1 Geo. 4, applies to this: the 26th section, which has been relied on for the defendants, does not appear to me to have any bearing on the question; and, although we have been referred to the case of *Cotterel v. Hooke*, where the Court decided on a clause in a statute similar in terms, yet there the act did not contain a provision similar to that which is to be found in the 28th section of the 1 Geo. 4, *viz.*, "that it shall be lawful to proceed against any prisoner discharged, upon any judgment, recognizance, or other security obtained or given, and which could not have been put in force against such prisoner, at the time of his obtaining such discharge, any thing in that act contained to the contrary notwithstanding." Besides, *Cotterel v. Hooke*

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(*a*) 2 Wils. 377. See also *Roles v. Rosewell*, 5 Term Rep. 538.  
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was the case of an annuity, and, therefore, an exception to the general rule; but here it is quite clear, that, at the time of the discharge of the defendants under the Insolvent Debtor's Act, the judgment could not have been put in force for the expenses incurred subsequently to such discharge. Coupling, therefore, the proviso in the 28th section of the statute, with the 8th section of the statute 8 & 9 *W. 3*, c. 11, to which I have before referred, it appears to me that the defendants are liable to the plaintiffs for those damages for which the verdict was taken at the trial. The provision in the 28th section over-rides every part of the act, and an insolvent is entitled to no benefit or advantage from his discharge, nor can he be released from a judgment, unless it could have been put in force against him at the time of such discharge. Therefore, putting the law, as relative to bankrupts, entirely out of the question, but grounding my opinion on the provision in the statute 1 *Geo. 4*, unless it can be erased, or be capable of receiving a different construction, I am of opinion, that it altogether prevents the defendants from taking the advantage they now seek to obtain, by virtue of their discharge under the act.

Mr. Justice PARK.—It appears to me that the cases cited in support of the rules obtained by the defendants do not apply, as the only question is, whether, coupling the statute 8 & 9 *W. 3*, with that of the 1st *Geo. 4*, c. 119 (the former of which appears to lay the foundation of the other, as far as regards the point now before us), the defendants are discharged. Now, this being a bond for the performance of covenants, falls expressly within the statute of *William*, and the plaintiffs have accordingly suggested breaches on the record; which, coupled with the provision in the 28th section of the Insolvent Debtor's Act, appears to me to be conclusive. The 26th section is entirely out of the question, as it only relates to cases for

which an insolvent might be subject to imprisonment at the time of, or after his discharge ; and the provision at the close of that section appears to me to be conclusive, *viz.* "that it shall be lawful to proceed against any prisoner so discharged, upon any judgment, recognizance, or other security obtained or given, and which could not have been put in force against such prisoner at the time of his obtaining such discharge ;" and here, it is evident that the judgment on which this *scire facias* is founded could not have been enforced at the time of the defendant's discharge. The principle laid down in *Cole v. Gower*, was first adopted by Mr. Justice *Lawrence* at *Nisi Prius*, on the Northern Circuit, in the case of *Stainforth v. Staggs*, and his decision was afterwards confirmed by the Court, in *Banco*, on a motion to set aside a verdict for the plaintiff, which had been found under his direction (a). The case of the Overseers of *St. Martin v. Warren* appears to me to be precisely in point ; and though it has been said, that the case of *Cole v. Gower* has been shaken, if not overruled, by that of *Shutt v. Procter*, yet it seems to me that the one is perfectly distinguishable from the other, as, in the latter, the Court merely directed the proceedings on a bastardy-bond to be stayed, on payment of debt and costs.

**Mr. Justice BURROUGH.**—The person who framed the 28th section of the statute 1 Geo. 4, c. 119, had, no doubt, the statute of *William* before him; and here, the judgment on which the *scire facias* is founded could not have been enforced at the time of the defendant's discharge, but would remain dormant until a new breach arose; it afterwards came in force, and the plaintiffs have acted in conformity with the statute, by assigning breaches accordingly. But I think that the pleadings are bad in point of form.

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(a) See 1 Camp. 398, n. 564.

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It is, however, unnecessary to consider that question, as it is now too late to raise an objection to them.

**Mr. Justice GASELEE, concurring—**

Rules discharged (a).

(a) See *Young v. Taylor*, 2 B. Moore, 326.

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In trover against the sheriff for taking the plaintiff's goods, under an execution against a third person, the officer who levied was *subpoenaed*, but not with a *duces tecum*, and when called, he stated that he had returned the warrant to the under-sheriff. The plaintiff had also served the attorney (on the record) for the defendant with a notice to produce the warrant; and it appeared that the defendant was in office at the time it was returned:— Held, that the notice to the defendant's attorney to produce the warrant, was equivalent to *subpoenaing* the under-sheriff to produce it, and entitled the plaintiff to give parol evidence of its contents.

**TAPLIN v. ATTY, Esq.**

THIS was an action of trover brought against the defendant, as late sheriff of *Warwickshire*, for taking, under an execution issued by a person of the name of *Reynolds* against the effects of one *Stanton*, certain sacks, the property of the plaintiff. At the trial, before Mr. Justice *Park*, at *Guildhall*, at the Sittings in the last Term, in order to connect the sheriff with the transaction, the plaintiff called the officer who made the levy, to prove the seizure, and he stated, that he had returned the sheriff's warrant to the under-sheriff, who resided at *Stratford*, and that, as he had not been served with a *subpoena duces tecum*, he did not think it necessary to procure it, or produce it.

The plaintiff then proved, by his attorney, that he had served the attorney on the record for the defendant with a notice to produce the warrant; which, it was contended for the plaintiff, was sufficient to entitle him to give secondary evidence of its contents. The learned Judge was, however, of opinion, that the notice to the defendant's attorney was not sufficient, but that the under-sheriff, in whose possession the warrant was proved to be, should have been served with a *subpoena duces tecum*, to produce the warrant: and, as no recognition of the act of the officer by the defendant as sheriff was proved, the plaintiff was nonsuited.

Mr. Serjeant *Vaughan*, in the last Term, obtained a rule nisi, that this nonsuit might be set aside, and a new trial granted, on the ground, that, under the circumstances, parol or secondary evidence of the contents of the warrant had been improperly rejected.

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Mr. Serjeant *Pell*, on a former day in this Term, shewed cause. In order to charge the defendant, as sheriff, with the act of his officer, in making the seizure in question, it was incumbent on the plaintiff to shew, either that the officer acted under the warrant of the sheriff, which fact could only be shewn by the production of the warrant itself; or that there had been some recognition of the act of the officer by the sheriff; and although in the latter case the warrant need not have been produced, yet here, in order to enable the plaintiff to give parol evidence of its contents, the officer who acted under it ought to have been served with a *subpoena duces tecum*, as well as the under-sheriff, the warrant being in his custody. The notice to the attorney for the defendant was of no avail, he not being the agent of the under-sheriff during the time the defendant was in office; besides, it did not appear when the officer returned the warrant to the under-sheriff, or whether or not the sheriff were then in office. At all events, both were out of office when the notice was given to the defendant's attorney to produce it. In *Martin v. Bell* (a), the under-sheriff for *Middlesex*, on examination, stated that the constant practice was, that a warrant, if unexecuted, was returned by the bailiff to the sheriff's office; but that, if the warrant were executed, the bailiff kept it for his own justification, and merely returned to the sheriff a memorandum of what had been done under the warrant, from which the sheriff made his return; and it was there held, that, in order to charge the sheriff for

(a) 1 Stark. N.P.C. 413.

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the act of his officer, the plaintiff must either produce the warrant, or prove some recognition of the act of the officer by the sheriff; and that a notice to the sheriff to produce the bail-bond (and here the notice was given to his attorney,) did not entitle the plaintiff to give parol evidence of its contents. Even if the warrant had remained in the hands of the officer, he was not bound to produce it, as he had not been served with a *subpoena duces tecum*; and when he proved that he had delivered it to the under-sheriff, the latter should have been called on to produce it, before parol evidence of its contents could have been received.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Wilde*, in support of the rule.—If a *subpoena duces tecum* had been served on the officer, it would have been unavailing, the warrant having been returned by him to the under-sheriff. It was, therefore, sufficient for the plaintiff to give notice to the sheriff, or his attorney, to produce the warrant; as the possession of it by his under-sheriff was equivalent to a possession by the sheriff himself, either on the ground of privity, or the relation of principal and agent. In *Brooke's Abridgment* (a), it is said, that the act of the under-sheriff, or his deputy, in the name of the sheriff, shall charge the sheriff, and for their act the sheriff himself shall be amerced, and no other. The sheriff and his officers, or deputies, must, therefore, be considered as one person; and in *Cameron v. Reynolds* (b), it was determined, that all actions for breach of duty of the office of sheriff must be brought against the *high* sheriff, although the cause of action arise from the default of the under-sheriff, or bailiff. In *Drake v. Sykes* (c), Mr. Justice *Lawrence* took a distinction between the case of an under-sheriff and

(a) Tit. "Office and Officer," pl. 24.

(c) 7 Term Rep. 117.

(b) Cowp. 403.

a bailiff, and said: "The admission of the under-sheriff may affect the high sheriff, because he is the general officer of the sheriff; but I do not think that the bailiff is his general officer." In *Partridge v. Coates* (*a*), a notice to the defendant to produce a cheque, which had been drawn by him and paid by his banker, was held sufficient to entitle the plaintiff to give parol or secondary evidence of its contents, although the cheque remained in the hands of the banker—on the ground that the banker is the agent of his customer. So, on the same principle, it was held, in *Baldney v. Ritchie* (*b*), that a notice to a defendant, a part-owner of a ship, to produce an order relating to the vessel, which it appeared he had delivered to the captain, was sufficient, in default of production, to enable the plaintiff to give parol evidence of the order; since the possession of the captain was, for that purpose, the possession of the defendant; on the ground that there was a privity between them. So here, the possession of the warrant by the under-sheriff was equivalent to a possession by the defendant, as sheriff; and if so, the notice to his attorney to produce it, was sufficient to entitle the plaintiff, in default of its production, to give evidence of its contents by parol.

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*Cur. adv. vult.*

Lord Chief Justice BEST now delivered the judgment of the Court as follows:—As the circumstances in this case raised a question of some novelty, we thought it right to reserve it for our consideration.—This was an action of trover, and brought against the defendant, the late sheriff of Warwickshire, for taking goods which the plaintiff alleged to be his property, instead of those of a person of the name of *Stanton*, against whom an execution had been issued, at the suit of one *Reynolds*, and under which the goods in question were seized. At the trial, in order to

(*a*) Ry. & Mood. 156.

(*b*) 1 Stark. N.P.C. 338.

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connect the defendant, as sheriff, with the transaction, it was necessary to prove his warrant to the officer, under which the levy was made. The officer was subpoenaed with a general writ of *subpoena*, and not with a *subpoena duces tecum*. Had he been served with the latter, he would, in all probability, have produced the warrant, as it would then have been his duty to have procured it. But, on his being called as a witness, he stated, that he had, previously to his being subpoenaed, returned the warrant to the under-sheriff. A doubt, however, has been raised as to the time at which the warrant was so returned. My Brother Park, who tried the cause, thinks it was during the time the defendant remained in office as sheriff. No *subpoena* was served on the under-sheriff, nor was any notice given to him to produce the warrant; but a notice was served on the attorney for the defendant in the cause, *viz.* the sheriff, and the warrant must either have been in his hands or those of his under-sheriff, when the notice was given to the attorney of the former to produce it. The only difficulty we feel is, as to the fact, whether the sheriff were out of office or not at the time the warrant was returned; for it would be imposing a heavy burthen on him, after his connection with his under-sheriff and other officers had been dissolved, to compel him to apprise such under-sheriff, that he, the sheriff, or his attorney, had received a notice to produce the warrant. I should have thought, that, if the sheriff had gone out of office before, or at the time the warrant was returned to his under-sheriff, he would have been entitled to our judgment; but, as he was still in office, and the warrant was proved to have been in the hands of his under-sheriff, who is in law identified with him, the one being the acting, and the other the ostensible officer, we think, that a notice to the sheriff, or his attorney, was equivalent to a notice to the under-sheriff. If, therefore, a notice to the sheriff would have been sufficient to require him to call on his under-sheriff to produce the war-

rant, so a notice to the attorney of the former must be considered as a notice to the sheriff himself; and he, therefore, ought to have sent to the under-sheriff for the warrant, or endeavoured to have procured it from him. The case of *Martin v. Bell* is a mere *Nisi Prius* decision, but is distinguishable from the present, inasmuch as there the warrant did not appear to be in the hands of the sheriff, nor was it traced to the under-sheriff; but, as it was executed, it remained in the custody of the officer. Here, however, the plaintiff had a right to give parol evidence of the contents of the warrant, as it was proved to be in the hands of the under-sheriff and not of the officer: and, as the possession of the under-sheriff must be considered as the custody of the sheriff, he being in office at the time the warrant was returned to the former, we are of opinion, that the rule which has been obtained for a new trial must be made—

Absolute (a).

(a) See *Fermor v. Phillips*, 5 B. Moore, 184, n. *Francis v. Neave*, 6 B. Moore, 120.

**BODY v. ESDAILE and Others, Assignees of TRIGGE, a  
Bankrupt.**

Monday,  
June 20th.

A RULE was on a former day in this Term obtained by Mr. Serjeant *Vaughan*, calling on the defendants to shew cause why the Prothonotary should not review his taxation of costs in this cause. The application was made on an affidavit of the plaintiff's attorney, which stated, that this cause had been tried three times; that, on the first trial, before Mr. Justice *Burrough*, at *Guildhall*, at the

Where there had been three trials, the verdict on the first being for the plaintiff, and on the other two for the defendant (*viz.* on the second by reason of a misdirection of the Judge, and on the merits on the third), and by the rule for the first new trial, the costs to abide the event, but the second rule was silent as to costs:—The Court allowed the defendant to take, at his option, the costs either of the first or of the second trial, together with those of the last.

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Sittings after *Michaelmas* Term, 1823, the plaintiff obtained a verdict (*a*); that the Court afterwards made a rule absolute for a new trial, on the ground that the verdict was against evidence; that, on the second, the defendants obtained a verdict, through a misdirection of the Lord Chief Justice in point of law; that a third trial was ordered, when the defendants obtained a verdict on the merits; that, when the rule for the first new trial was made absolute, the costs of the former trial were ordered to abide the event of the second; but that nothing was said about costs in the last rule; and that the Prothonotary, on taxation, had allowed the defendant the costs of the two last trials. The learned Serjeant submitted, that the costs of the second trial ought not to have been allowed to the defendants, as the verdict was obtained through the misdirection of the Chief Justice.

Mr. Prothonotary *Watlington* stated, that the practice of this Court differed from that of the *King's Bench*; that in the latter, when the rule is silent as to costs, the costs of the first trial are not allowed, whichever way the verdict may go upon the second; whilst, in this Court, if a new trial be granted, and the rule say nothing about costs, if the verdict on the second trial go the same way, the party succeeding is entitled to the costs of both trials. And he referred to the case of *Schullbred v. Nutt* (*b*), where Mr. Justice *Buller* said: "Where the rule expresses, '*without costs*', the costs of the former trial are in no event allowed. Where nothing is said in the rule about costs, if the second verdict be the same way with the first, the costs of the first are allowed. Where the second verdict is not the same way with the first, the party obtaining it is not allowed the costs of the first trial:" and no distinction is made as to a misdirection by the Judge.

(*a*) See 1 Car. & Payne, 62.      *Shoolbred v. Nutt*, 2 Tidd, 7th

(*b*) M. T. 23 Geo. 3, *Hullock on Costs*, 2d Edit. 395; *S. C. nomine*,

Mr. Serjeant *Pell*, and Mr. Serjeant *Wilde*, afterwards shewed cause, and submitted, that, as the Court had ordered the costs of the first trial to abide the event of the second, and as the defendants had on that trial obtained a verdict on the law, and eventually a verdict on the merits, they were, at all events, entitled to the costs of the two last trials.

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The Court, deeming it advisable to assimilate, as much as possible, the practice of the two Courts in cases of this nature, required time to consider.

**Lord Chief Justice BEST.**—This case came before us on a motion for the Prothonotary to review his taxation of costs; but we are of opinion, that, upon this occasion, it is not necessary to interfere with the established practice of the Court, although it might be fit to consider it where a case calls upon us to do so. This, however, differs from ordinary cases, as when the first new trial was granted, we had, by the terms of the rule, an authority to reserve the consideration of costs; and we directed those of the former trial to abide the event of the second. We are, therefore, of opinion, that, under all the circumstances, no general rule is applicable to this case. If the plaintiff consent to take the costs of the first trial, he must give up the costs of the other two, or the defendants may have their option to take the costs of the first or second trial, and also the costs of the third; but, if they elect to take the costs of the second, the plaintiff is to have the costs of the first.

On these terms, the rule was ordered to be made—

Absolute.

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The Court refused to order the proceedings on a writ of right to be stayed, until payment to the tenant of the costs of a former action of ejectment, between the same parties, for the recovery of the same premises.

CHATFIELD and Wife, Defendants; SOUTER, Tenant.

THIS was a writ of right. A rule had been obtained by Mr. Serjeant *Wilde*, on a former day in this Term, calling on the defendants to shew cause why all further proceedings should not be stayed until the tenant's costs of an action of ejectment, which had previously been brought for the recovery of the same premises demanded in this suit, had been paid. The affidavit on which the motion was founded, stated, that, in the action of ejectment, the lessors of the plaintiff (the present defendants), after having, in 1816, entered the cause for trial, withdrew the record. The learned Serjeant submitted, that, although the merits might not have been tried in that action, still, that, when the plaintiffs found that they had mistaken their remedy, the defendant was entitled to the costs of that suit, before he was bound to take any step in the present.

Mr. Serjeant *Pell*, being now about to shew cause, was stopped by the Court, who called on—

Mr. Serjeant *Wilde*, to support his rule.—It is the established practice of the Courts not to allow a second action or suit to be proceeded in until the costs of the first are satisfied, when both actions tend, in substance, to support the same claim, notwithstanding a different form be resorted to. It is quite clear that the defendants had no merits in the action of ejectment, or they would not have withdrawn the record; and the tenant ought not now to be harassed by this suit, the parties having allowed their claim to lie dormant so long, *viz.* from 1816 till the commencement of the present Term.

Lord Chief Justice *BEST*.—Although the defendants

in this suit had previously brought an action of ejectment against the tenant, which they abandoned, yet we have no power to stay the proceedings on this writ until the costs of that ejectment are paid. The plaintiffs in the former suit might have withdrawn the record for want of a material witness, or for some other substantial cause. The proceeding by a writ of right is altogether different from that of ejectment; and even in an action of the latter description, where the Courts order the proceedings in the cause to be stayed until the costs of a former one are paid, it frequently operates with great hardship; but the hardship would be still greater, if we were to extend that practice to writs of right, as it might frequently prevent a poor man from asserting a just title, or prosecuting his suit against another who had none. In *Doe d. Williams v. Winch* (a), the Court of *King's Bench* refused to stay the proceedings in an ejectment until the taxed costs of a suit in Equity, brought by the same party for the recovery of the same premises, were paid.

**Mr. Justice PARK.**—I am of the same opinion: and the ground on which I mainly rely, is, that the proceeding by a writ of right is totally different from an action of ejectment.

**Mr. Justice BURROUGH.**—The same question cannot arise in an action of ejectment as in a writ of right; for, in the one, the lessor seeks to recover possession on his legal title, whilst in the other the demand is founded on the mere right.

**Mr. Justice GASELEE.**—A writ of right is a proceeding *sui generis*. Besides, the practice of the Court of *King's Bench*, as to staying proceedings in a second action by the plaintiff for the same cause, appears to differ from

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this, as that Court allows proceedings to be stayed till the costs of the former action are paid, wherever the plaintiff's proceedings appear to be vexatious; whilst this Court never interferes, unless the merits of the case have been tried in the former action: and this distinction was taken, and the authorities referred to in its support, in a note to the case of *Doe d. Walker v. Stevenson (a)*. This rule, therefore, must be—

Discharged.

(a) 3 Bos. & Pnl. 23; See also *Hullock on Costs*, 2d Edit. 466.  
Tidd's Practice, 7th Edit. 556.

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In ejectment, a judgment signed against the casual ejector, and an execution sued out thereon, were withdrawn, the tenants in possession giving an undertaking to appear and enter into the common consent-rule, to plead *instanter*, and to accept short notice of trial; but, they having failed to comply with such undertaking, and having offered no defence at the trial, final judgment was signed and costs taxed, when the lessor of the plaintiff was served with a rule for the allowance of a writ of error:—

The Court, notwithstanding, permitted him to sue out execution on his judgment against the casual ejector.

**Doe, on the demise of MORGAN, v. FRISBY and Another.**

A RULE *nisi* had been obtained by Mr. Serjeant *Pell*, in the course of the last Term, on the part of the defendants in this cause, for setting aside the judgment obtained by the lessor of the plaintiff against the casual ejector, and the execution issued thereon, with costs, on the ground of a misnomer of the tenants, in the notice to appear, at the foot of the declaration. That rule, on cause shewn by Mr. Serjeant *D'Oyley*, was afterwards discharged, and the execution withdrawn, on the tenants in possession undertaking to appear and enter into the common consent-rule, to plead *instanter*, and to accept short notice of trial for the Adjourned Sittings after the last Term. No appearance, however, was entered, nor was any defence made at the trial; and, after final judgment was signed, and the costs taxed, the lessor of the plaintiff was served with a rule for the allowance of a writ of error.

Mr. Serjeant *D'Oyley*, on a former day in this Term, obtained a rule *nisi*, that execution might issue against the tenants in possession, notwithstanding the allowance

of the writ of error.—The affidavit of the attorney of the lessor of the plaintiff, in support of the motion, stated, that he verily believed that the writ of error was brought solely for delay; and that the lessor had received notice from the surveyor of the city of *London*, that, unless the premises (for the recovery of which the ejectment was brought, and which were in a ruinous state) were forthwith pulled down, proceedings would be taken, on the part of the city, to pull them down; which would put the plaintiff to great additional expence. The learned Serjeant submitted, that the undertaking entered into by the tenants in possession, amounted to an engagement to try the merits of the cause, and not to create delay; and that the writ of error was, at all events, sued out against good faith.

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Morgan  
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Mr. Serjeant *Pell* now shewed cause.—Error will lie after a verdict and judgment in ejectment, as well as in any other case. Although in *Evans v. Sweet* (*a*), where a plaintiff brought a writ of error on a judgment of nonsuit, the Court refused to stay execution sued out by the defendant after service of a rule for the allowance of such writ, unless the plaintiff, or his counsel, pointed out some real or specific error,—and an affidavit, by the plaintiff's attorney, stating, that he was advised there was real error, was deemed not to be sufficient; yet, there the plaintiff, by allowing himself to be nonsuited, was out of Court, and thereby waived any right he might have to take an objection to the record, to reverse the judgment for any error or defect in substance; but in *Harrison v. Grote* (*b*), the Court of *King's Bench* refused to allow execution to be taken out, pending a writ of error in Parliament, on the ground that it was brought for delay, merely because the defendant, without objection, suffered the judgment to be

(*a*) 9 B. Moore, 609; S. C. 2 Bing. 326.      (*b*) 6 Term Rep. 400.

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v.  
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affirmed in the *Exchequer Chamber*; and Lord *Kenyon* there said: “*Non constat*, but that there may be error on the record.” So here, there might be a variance with respect to the names of the parties, or the premises might be misdescribed; and it is not necessary for a defendant in ejectment to point out the real or specific ground of error, as in the case of a judgment of nonsuit, or *non pros*. At all events, the affidavit in this case is not sufficient to disclose to the Court that the writ of error was merely sued out for delay. It amounts to no more than a surmise, or belief, on the part of the attorney for the lessor of the plaintiff; whereas, it should have been shewn that a declaration to that effect had been made either by the tenants in possession, or their attorney. In *Rawlins v. Perry* (*a*), a declaration by the defendant’s attorney, that the debt for which the action was brought would be settled, and that time was all that the defendant wanted, was held to be insufficient ground for allowing the plaintiff to take out execution pending a writ of error; and in *Levett v. Perry* (*b*), the Court refused to stay proceedings pending a writ of error on a judgment of nonsuit, without some declaration of the party, or his attorney, or bail, that the writ was brought only for delay.

*Per Curiam*.—The suing out a writ of error was not a compliance with the terms of the undertaking of the tenants in possession; and, as it has not been performed in any one particular, the lessor of the plaintiff may sue out execution on his judgment against the casual ejector. This case, therefore, may be decided without entering into the general question, and is altogether distinguishable from those cited.

Rule absolute accordingly.

(a) 1 New Rep. 307.

(b) 5 Term Rep. 669.

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## PETTY and Another v. ANDERSON.

THIS was an action of *assumpsit*, for goods sold and delivered.—The declaration contained the usual counts. The defendant pleaded the general issue. At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Adjourning Sittings after the last Term, it appeared that the plaintiffs were grocers, and the defendant a baker and confectioner. The plaintiffs' shopman proved, that he had frequently seen the defendant in the shop of the premises at which the goods had been delivered, which was situate in *Lombard Street*; that he was usually dressed in a working dress, and appeared as if acting in the business; that, on the shopman's applying to him for payment of the money due to the plaintiffs, he said, that the witness had better speak to his wife, as she managed the affairs of the shop; that he did so, when the wife said, that she could not pay then, but that she would send the money. The witness also proved, that the name of *Anderson* was over the door of the shop, and that the goods had been delivered by the plaintiffs, between *August*, 1823, and *February*, 1824. The plaintiffs' clerk also proved, that he had frequently called at the defendant's house for sums due to the plaintiffs; that the defendant generally came from the bakehouse to the shop, and referred the witness to his wife, sometimes saying, that she managed the business, and that he was in her employ, or acted as a journeyman, and that he received no wages; and that, on one occasion, he said, that the plaintiffs had better not go to law; as, if they sued him, they would perhaps not get more than four shillings in the pound. A third witness proved, that the defendant's son frequently ordered the goods, and that, when he, the witness, applied for money to the defendant's wife, she said, that she would tell Mr. *Anderson*. For the defendant, it was proved, that, previously to *August*,

The defendant, a baker and confectioner, was discharged under the Insolvent Debtor's Act, and the business, during his absence, and after his return from imprisonment, was carried on by his wife, who purchased goods in her own name. The wife was acknowledged by the landlord as tenant of the house in which they lived, and was rated in the books of the parish as the occupier. The defendant was aware of, and assented to, the dealings of his wife, and, being with her, partook of the profits of the trade: —Held that he was liable in an action for the price of the goods, notwithstanding that the invoices were made out in the name of the wife alone, she being his agent.

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1823, he had carried on the business of a baker in the same house; that he had been then arrested and gone to prison, and had afterwards been discharged under the Insolvent Debtor's Act, when he returned to live with his wife; that, during his confinement, the goods in the house had been sold by the landlord, under a distress for rent, and purchased by a friend, for the defendant's wife, who then set up and carried on business on the premises, as a baker and confectioner, and that several tradesmen in the neighbourhood had given her credit, and that she had made payments to them on her own account. That the invoices, or bills of parcels of the goods supplied by the plaintiffs, were made out in the name of the wife, making her the debtor; and that, in the receipts, the sums paid were stated to have been received from her; that she paid the landlord the rent of the house, he having accepted her as his tenant; that she was rated as the occupier, and had paid the church, poor, and paving rates; and that she had supplied the paupers in the poor-house of the parish, in which their house was situate, with bread. That the name of *Andrew Anderson* was over the door before the defendant went to prison, but that the Christian name had been since effaced, the word *Anderson* alone remaining. It was also proved, that the defendant's son and daughter had frequently ordered goods in the name of their mother, and that the defendant himself had never interfered with the receipt or payment of money since his return from prison. His Lordship having summed up the whole of the evidence to the Jury, said, that, in his opinion, the situation of the defendant precluded the application of the law, as to his wife being a *feme* sole trader; and that, although a married woman in *London* might carry on business on her own account, yet, as in this case the defendant (the husband) lived in the same house with her after his discharge from prison, assisted in the business, and partook of, or

subsisted on, the profits, as he had declared that he received no wages, notwithstanding the invoices were made out by the plaintiffs in the name of the wife, it must be taken that she was acting as the agent of her husband; and, if so, the credit was, in point of law, given to him; and although, when he was asked for money, he referred to his wife, yet he said, that the plaintiffs had better not go to law; as, if they did, they might only get four shillings in the pound. This, together with the other circumstances, identified the defendant with the business, and shewed his recognition of the dealings of his wife. His Lordship, in conclusion, asked the Jury, whether, from the evidence, any reasonable man could doubt but that the wife was the agent of her husband, and that he ratified her acts; and he directed them to find a verdict for the plaintiffs, damages 100*l.*, being the amount of the goods delivered. A verdict having been entered accordingly—

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that such verdict might be set aside, and a new trial granted, on the grounds, *first*, that, under the circumstances, as proved at the trial, the defendant's wife must be deemed a sole trader; and that the case of *Beard v. Webb* (in error) (*a*), was precisely in point, to shew that a *feme covert* sole trader in the city of *London*, is not liable to be sued as such in the Courts at *Westminster*;—and, *secondly*, that the Lord Chief Justice had misdirected the Jury; as he ought to have left it to them to say, to whom the credit was given, or whether the plaintiffs had not given credit to the wife alone; and he cited *Bentley v. Griffin* (*b*), where it was decided, that it is a question of fact, whether a tradesman who furnishes goods to a man's wife gives credit to her or her husband; and that, if the credit be given to her, the husband is not liable,

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although the wife live with him, and he see her in possession of some of the goods: and although Mr. Justice *Heath* there left it strongly to the Jury, to consider whether the credit had not been given to the wife and not to the husband; yet they found a verdict for the plaintiff; and, on motion for a new trial, Mr. Justice *Dallas* said: "The question is, whether the general liability of the husband is not repelled by the circumstances which shew that the credit was given to the wife. I think most clearly that the credit was given to the wife, and that the husband is liable for no part of these charges:" and the rule for a new trial was made absolute.

Mr. Serjeant *Vaughan* now shewed cause.—It is quite clear that the verdict is not against evidence, and it was most properly left to the Jury, to say, whether, under the circumstances, the wife was not the agent of her husband. She was so by presumption of law, and the defendant was guilty of a gross fraud. He had been in the habit of purchasing goods from the plaintiffs previously to his imprisonment, and, although the wife dealt with them afterwards, yet she cannot be considered as a sole trader; for the husband not only resided in the house, but constantly intermeddled in the business. If a husband and wife live in the same house, and dine at the same table, and he appear to carry on the business, and the wife contract for goods in her own name, and he assent to it, it must be presumed that she acts as his agent. In this case the Jury had a right to adopt or reject the fact of agency, as it was expressly left to them, although with a strong opinion of the Lord Chief Justice, that there could be little or no doubt of that fact.

Mr. Serjeant *Wilde*, in support of the rule.—It should, at all events, have been left to the Jury to say, whether the credit, by the plaintiffs, was given to the defendant or

to his wife, but no such fact was left to them. Even supposing it to be a presumption of law, that credit was given to the husband, or that the wife acted as his agent, yet those were circumstances to be left to the Jury; and it was for them to say whether that presumption was not rebutted by the facts; as, for instance, the payment of rates by the wife, the furnishing of goods by several tradesmen to her credit alone, the invoices or bills of parcels of the plaintiffs being made out in her name, and her carrying on the business on her own account, and supplying the poor of the parish with bread. After the imprisonment of the husband, the wife was supported by her friends, and as the plaintiffs elected to give credit to her alone, they cannot now seek to charge the defendant for goods supplied to his wife. Her credit was far better than her husband's, and if the goods had been ordered on his account, or to his credit, in all probability they would not have been supplied. At all events, it must be conceded that, after the imprisonment of the husband, the plaintiffs elected to give credit to the wife alone, and it was competent to her to support herself and her family from the profits of the business, which it was satisfactorily proved she carried on upon her own account.

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**Mr. Justice PARK.**—The grounds on which applications for new trials were wont to be made, have lately been much relaxed. The principles on which such applications formerly rested, were, either, where it appeared clear that there had been a misdirection by the Judge, or that he had improperly directed a nonsuit. There is always a difficulty as to the mode in which a Judge is to express his opinion, in summing up a case to the Jury. Of late, if he express himself in strong terms, or intimate that the verdict should be in favour either of the plaintiff or defendant, although it tend to lead to a just conclusion, an application is generally made to the Court to

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set it aside. Now, here, although my Lord Chief Justice expressed a strong opinion at the trial, yet he summed up the whole of the evidence, and stated all the circumstances of the case to the Jury; and though his opinion might have had some weight with them, yet they did not seem at all disposed to find a verdict for the defendant, and they were clearly empowered to exercise a judgment of their own. The rule in cases of this kind, and the limits within which applications for new trials should be confined, are most clearly and accurately laid down by Mr. Justice *Buller*, in *Cox v. Kitchin* (*a*), where, no point having been saved at the trial, the Court refused to set aside a verdict, on a question of law, the justice and conscience of the case being with it. He there said: "Motions for new trials are governed by the discretion of the Court. Where the Judge at *Nisi Prius* has thought fit to save a point, the Court has been in the habit of considering itself in the situation of a judge, at the time of the objection raised. But this case comes before us without any point saved, and, therefore, we must look to the general justice of the case before we interpose by granting a new trial; nor is it necessary that we should nicely examine whether the defendant be strictly liable in point of law. The leading reported decision on the subject of granting new trials, is that of the Duchess of *Mazarine* (*b*). There can be no doubt but that was the case of a verdict against law: yet the Court said, that, as the justice and conscience of the case were clearly with the verdict, they would not interpose."—That appears to me to be entitled to great weight, and the present verdict not only seems to be correct, but I think my Lord Chief Justice might have left it much stronger to the Jury, *viz.* whether, on considering the whole of the circumstances, the defendant had not been guilty of a gross fraud, by endeavouring to cheat the

(*a*) 1 Bos. & Pul. 339.(*b*) 1 Salk. 116; 2 Salk. 646.

plaintiffs, and other tradesmen who supplied goods, and delivered them at the house in which he resided with his wife. He took as active a part in the business, as before he went to prison. As to the justice of the case, there can be no doubt it was clearly with the verdict, and we ought not to disturb it on account of any supposed or captious objection to the mode in which the question was left to the Jury. In *Langfort v. Tiler* (*a*), Lord Chief Justice *Holt* ruled, at *Nisi Prius*, at *Guildhall*, that a husband was liable for goods supplied on the wife's contract, merely because they cohabited together: and here, the defendant and his wife not only lived in the same house, but took their meals at the same table, and it did not appear that the defendant ever dissented from, or repudiated, the acts of his wife.

**Mr. Justice BURROUGH.**—If my Lord Chief Justice had rejected any evidence which he ought to have received, or had omitted to sum up the whole of the facts to the Jury, there might have been some ground for a new trial; but, when all the circumstances are looked at, it appears to me to be clear, that another Jury must find a similar verdict. I should have left the case to them precisely in the same way my Lord Chief Justice did; for it was the strongest possible case from which to imply a liability on the part of the husband, as he not only lived with his wife—which rebuts the presumption of her being a sole trader—but actually worked or assisted in the business. The plaintiffs were accordingly entitled to recover for goods supplied under such circumstances.

**Mr. Justice GASELEE.**—I have no doubt, but that, if we were to grant a new trial, the verdict would be the same way. If my Lord Chief Justice had asked the Jury

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whether they had any reasonable doubt that the credit was given to the husband, no objection could have been raised. Perhaps I should have left it to them to say, whether the credit was given to him or to his wife; but, as he carried on the business in his own name, and in the same house, before he was arrested and went to prison, and as the wife was rated during his confinement, it is but fair to presume, that, when he returned home and took as active a part in the business as he did before, the goods were supplied on his account, although he stated that he was a mere journeyman to his wife, for he added, that he received no wages.

Lord Chief Justice Best.—I should be extremely sorry if I expressed too strong an opinion at *Nisi Prius*, or infringed on the privileges of the Jury, as I should not have been warranted in so doing. I said, that the presumption was, that the contract was made with the husband, he being present at the time the goods were delivered, assisting in the business, and taking advantage of it by living on the profits of the trade. That raises a legal presumption that the wife was his agent, and conducted the business as such. It is far stronger than the case of *Longfort v. Tiler*, as, there, the parties merely cohabited together. In *Comyns's Digest* (a), it is laid down, that—if the wife be generally allowed by the husband to be housekeeper, or to buy for him, her contract charges the husband; so, if a wife buy necessary apparel for herself, the assent of the husband shall generally be intended;—and here, his assent to the goods being furnished must be presumed, as he partook of the profits of the trade. He might have discontinued the business whenever he thought proper. Although the legal presumption arising from his presence, might be rebutted by facts, yet

(a) Tit. "Baron & Feme" (Q).

there were none to repel such presumption; and although the invoices, or bills of parcels, were made out in the name of the wife, yet, as the husband lived in the house, saw goods sent, and did not object to their delivery—notwithstanding the wife purchased them—the assent of the husband must be intended. This, therefore, is a far stronger case than that, where a wife bought necessary apparel for herself. The case of *Bentley v. Griffin*, is not like the present. It is true, that there the clothes were furnished to the wife whilst she was living with the husband, and he saw her wearing them; but the contract was made with the wife privately, and when some of the articles were sent home, she directed the servant to put them away, that her husband might not see them. He, therefore, was not privy to her acts; and it was also proved, that the clothes furnished were not suitable to her degree in life, and that she came to the plaintiff's shop, to order goods, in a curriicle which did not belong to her husband. Here, however, there was no evidence to repel the assent of the husband to the articles being supplied for the carrying on the trade, and more particularly so, when it appeared that every meal he eat; and even the bed he slept on, were furnished out of the profits of the business.

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Rule discharged.

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HOLMES, Demandant; SERTON, Tenant; FOREMAN, Vouchee.

Tuesday,  
June 21st.

MR. Serjeant Rough moved to amend this recovery, which was suffered in Hilary Term, 1796, by inserting the words "advowson, tithes, presentation, and right of

The Court will not allow a recovery to be amended by inserting the words "advowson and tithes,"

although the deed to lead the uses contain the general word *hereditaments*, without an affidavit stating how the presentations have gone from the time of suffering the recovery, and by whom the last was made, and whether prior to, or since the recovery.

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patronage to the church of *Honeage*, in the county of *Kent*." On the production of the deed to make a tenant to the *præcipe*, it appeared that the premises thereby conveyed were described as "all the messuages, lands, tenements, and *hereditaments*" of the *vouchee*, and of which he was seised, in the county of *Kent*. The learned Serjeant relied on the cases of, *Dowse*, Demandant; *Lloyd*, Tenant; *Reeve*, Vouchee (*a*), where a recovery was amended by inserting the words, "all and all manner of tithes whatsoever, yearly arising, &c., from and out of the said premises," the word *hereditaments* being contained in the deed to lead the uses; *Milbanke v. Jolliffe* (*b*); and *Horne*, Demandant; *Lodge*, Tenant; *Preston*, Vouchee (*c*), where recoveries were amended by inserting the word *advowson*, the word "hereditaments" being contained in the deed. It appeared by affidavit that the *advowson* and tithes formed part of the estate intended to pass by the recovery, and that possession had gone conformably with it ever since it was suffered.

The Court said, that there was no doubt but that the *advowson* and tithes passed under the general word "hereditaments"; but they referred to the case of *Coldough*, Demandant; *Praed*, Tenant; *Savage*, Vouchee (*d*), where the Court required an affidavit, stating how the presentations had gone from the time the recovery was suffered; and they now directed an affidavit to be made, shewing by whom the last presentation was made, and whether it were prior to, or since the recovery; and as the Term was now at an end, Mr. Justice *Burrough* consented to take it at Chambers.

(*a*) 2 Bos. & Pul. 578.

(*b*) Id. 579, n.

(*c*) 3 Taunt. 462.

(*d*) 7 B. Moore, 268.

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Wednesday,  
June 22nd.

Partiality and  
improper con-  
duct in an arbi-  
trator form no  
answer to a motion  
for an at-  
tachment for not  
performing an  
award, although  
they may afford  
grounds to set  
aside the award.

## BRAZIER v. BRYANT.

A RULE was obtained by Mr. Serjeant *Wilde*, on a former day in this Term, calling on the defendant to shew cause why an attachment should not issue against him for non-payment of the sum of 350*l.*, pursuant to an award made in the last vacation, the order of reference having been made a rule of Court, and the above sum legally demanded from the defendant. The rule for the attachment was personally served on the defendant.

Mr. Serjeant *Onslow* now shewed cause, and produced affidavits to shew that the arbitrator had been guilty of partiality and improper conduct, he having examined witnesses without their being sworn, and refused to allow the defendant to cross-examine them, although required so to do; and that other witnesses had been examined in the absence of the parties, without having been sworn.

The Court referred to the case of *Holland v. Brooks* (*a*), where it was held, that a party could not object to an award, for any defect not apparent on the award itself, in shewing cause against a motion for an attachment; and *Braddick v. Thompson* (*b*), where it was held, that partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, could not be pleaded in bar to an action on the bond conditioned for the performance of the award; but was only matter for application to the equitable jurisdiction of the Court to set aside the award.

The rule was accordingly made absolute, on the terms of the attachment lying in the office for a month; and if the above sum of 350*l.* was not brought into Court within that time, Mr. Serjeant *Onslow* was to be considered as having obtained a rule *nisi* to set aside the award.

(*a*) 6 Term Rep. 161..

(*b*) 8 East, 344.

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The defendant, for the purpose of redeeming or paying off two annuities previously granted by him, the consideration for which was 630*l.*, together with arrears and charges thereon, granted another annuity in consideration of 910*l.* That sum having been paid to him by the grantee's agent, he, at the desire of the latter, immediately returned to him the whole sum to pay off the former annuities and charges (amounting to 751*l.*), and the costs of the negotiation (which were 158*l.*), and received from the agent only 1*l.* as the balance of the account:—The Court ordered the deeds to be delivered up to be cancelled, and a judgment entered up thereon, to be vacated.

## HENRY v. TAYLOR.

A RULE was obtained, by Mr. Serjeant Vaughan, on the last day of the last Term, calling on the defendant to shew cause, why an annuity granted to him by the defendant should not be set aside, the securities on which it was founded delivered up to be cancelled, and a judgment signed thereon vacated, on the ground of an illegal return or retainer of part of the consideration-money.—The application was founded on an affidavit of the defendant, which stated, that, in 1807, he being in embarrassed circumstances, applied to Messrs Howard & Gibbs to procure him a sum of money, by way of annuity; that he accordingly granted an annuity to a person whom they stated to be a client of theirs, of 60*l.* a year, on receipt of the sum of 360*l.*, as the consideration money, from which Messrs. Howard & Gibbs deducted 50*l.* as the expences of procuring the same and preparing the necessary deeds. That in 1808, the defendant granted a further annuity of 45*l.* a year, on the receipt of 270*l.* as the consideration for such annuity; that, for the purpose of discharging these two annuities, and also for discharging certain arrears, and charges for insurance, he, in 1814, again applied to Howard & Gibbs, who proposed to increase the consideration-money from 630*l.* to 910*l.*, and the annuities from 105*l.* to 130*l.*; that, on the payment of the said sum of 940*l.*, Gibbs put into his, the defendant's, hands Bank of England notes, which he stated to amount to that sum, and which he, the defendant, immediately returned to Gibbs, at his desire; that the latter then handed him 1*l.* as the balance of the account between them; that Gibbs and two of his clerks were the only persons present at the time of the transaction; and that Gibbs stated, that the costs due from the defendant to him and Howard amounted to 158*l.*; but that no bill of costs was delivered to him, nor any specific statement of charges mentioned for negotiating the annuities, but merely the gross sum demanded and retained by Gibbs.

Mr. Serjeant *Wilde* now shewed cause, on an affidavit of *Gibbs*, which stated, that the whole of the above sum of 910*l.* was paid to the defendant, and that, after he had executed the securities, he returned it to him, *Gibbs*, and requested to be furnished with a statement of the account between him and the grantees of the former annuities; that, on such account being tendered to him, he voluntarily paid to *Gibbs* 75*l.*, to be applied to the use of such grantees, and 168*l.* as the amount of costs in the different transactions. The learned Serjeant submitted, that this was distinguishable from the other cases which had been lately decided in this Court, as here the money was not returned to *Gibbs* as the result of any previous agreement that he, as the broker, might have more than his lawful commission, but was merely returned for the purpose of paying off just debts, *viz.* to redeem the two former annuities, and without any intention of fraud; and, consequently, that the securities and judgment ought not to be set aside, or vacated, as the transaction in its result was beneficial to the grantor.

Mr. Serjeant *Vaughan*, in support of his rule, referred to the case of *Coventry v. Champneys* (*a*), where Messrs. *Howard & Gibbs* had been employed by the grantor to raise money, by way of annuity, and by the grantees to pay the consideration-money over to the grantor, and, at the time of the execution of the deeds to secure the annuity, they received back from the grantor, or retained, a considerable portion of the consideration-money, for a debt alleged to be previously due to them from the grantor; it was held to be an illegal retainer, and the Court ordered the securities to be set aside on equitable terms; although the grantees had not received any part of the money returned or retained by *Howard & Gibbs*, and although the latter acted in the transaction without their direction or knowledge. Here, it is quite clear that *Gibbs* acted as the agent of the grantees as well as of the defendant,

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(a) 8 B. Moore, 302; *S. C. nomine Gorton v. Champneys*, 1 Bing. 287.

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the grantor; and in *Calton v. Porter* (*a*), where the agents of the grantor insisted on retaining the amount of money they had before advanced the defendant, as well as the charges of preparing the securities for the annuity, the Court ordered it to be set aside, although the grantee, who had entrusted them with the consideration-money, was wholly ignorant of the retainer. Although in *Mouys v. Leake* (*b*), Lord *Kenyon* held, that, if it were agreed by the grantor and grantee of an annuity, that the former should pay the expenses of the writings, and he immediately after receiving the consideration-money paid the fair charges of the writings out of that money, no notice need be taken of it in the memorial, but, that it might be there stated, that the whole consideration-money was paid to the grantor; yet the statute 53 Geo. 3, c. 141, s. 6, enacts, "that, if any part of the consideration for the purchase of an annuity shall be returned to the person advancing the same, or if it shall be retained on pretence of answering future payments of the annuity, or on any other pretence, the securities may be set aside, on application to the Court."

**Lord Chief Justice BEST.**—I am clearly of opinion, that the rule for setting aside this annuity must be made absolute. The ground of the motion was, that part of the consideration-money advanced to the grantor, was *retained* or *returned*. Either of those facts will apply to this transaction, and give us power to interfere; for, if a party give a sum with one hand, and receive it back with the other, it certainly amounts to a retainer. But it appears to me to be unnecessary to decide this case on that point; for it is sworn by the defendant, that a sum of 158*l.* was demanded by, and retained or returned to, *Gibbs*, for negotiating the annuity, and that no bill of costs was delivered, nor were the different items stated. That is surely an enormous charge, and is, unexplained, unfair upon the

(*a*) 9 B. Moore, 703; S. C. 2 Bing. 370.    (*b*) 8 Term Rep. 411.

face of it. If those charges had been fair and just, the parties who demanded them had ample opportunity to shew it, their attention having been drawn to it by the affidavit on which the rule was obtained. I fully concur with the principle established by the cases that have been lately decided on this subject in this Court, and, without particularly referring to any of them, I have no doubt, but that this case is one which the statute intended to remedy.

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Mr. Justice PARK.—I am of the same opinion. If we were to put the construction on the statute, as contended for by the plaintiff, the grantee of the annuity, we should entirely defeat its object. It must be recollected, that this is not like a question arising as to the construction of a new act of Parliament; for the statute in question has of late come before us in several instances, and, after the most ingenious and able arguments of the bar, and the fullest consideration by the Court, we delivered our judgment in the case of *Coventry v. Champneys* (*a*), and I, for one, cannot now say that it was wrong: indeed, I think we came to a right conclusion. It is immaterial to consider, whether the transaction in this case amounted to a return or retainer of the consideration money. It was a complete juggle and manœuvre throughout. *Gibbs*, who acted as the agent for both parties, paid over the sum of 910*l.* with one hand, and it is sworn that it was immediately paid back to him by the grantor, and that he retained all but 1*l.*, which he gave the grantor as what was due to him, or as the balance of the account between them. This was clearly a contrivance to attempt to elude the provisions of the statute 53 Geo. 3, which was passed for wise and salutary purposes.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule absolute.

(*a*) 8 B. Moore, 311.

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Saturday,  
June 22d.

C. and H. R., being seized in fee of certain estates, by indentures of lease and release of the 1st and 2d June, 1750, and a common recovery suffered in pursuance thereof, settled them to such uses as C., H. R., and D. his wife, and M. R., should, by their joint deed executed in the presence of two witnesses, appoint; and, in default of such appointment, as to part, to the use of C. for life, and subject to C.'s life estate as to that part; and, as to the whole of the residue, in default of appointment, to the use of H. R. in fee. By indentures of lease and release, of the 1st and 2nd October, 1751 (the execution of the parties to the release being attested by three witnesses) and made between certain persons therein named

of the first part; C., H. R., and D. his wife, and M. R., of the second part; and W. M., J. L., R. W., and P. W., of the third part; C., H. R., and D. his wife, did grant, bargain, sell, release, confirm, direct, limit, and appoint, unto W. M., J. L., R. W., and P. W., in their actual possession being, by virtue of a lease for a year made to them by the said C., H. R., and D. his wife, and M. R., the same estates before mentioned, to hold to them the said W. M., J. L., R. W., and P. W., in fee, to the several uses therein mentioned and set forth:—Held, that, under the deeds of June, 1750, and the recovery suffered in pursuance thereof, and the deeds of October, 1751, the legal fee of such of the estates comprised in the first-mentioned deeds as were settled and assured by the last, did not rest in W. M., J. L., R. W., and P. W.

## WYNNE v. GRIFFITH.

THE following case was sent by his Honour, the Master of the Rolls, for the opinion of the Judges of this Court:—

By indentures of lease and release, bearing date respectively the 1st and 2nd days of June, 1750, the release being tripartite, and made between *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, spinster, daughter and heir apparent of the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, widow, of the first part; *John Salusbury* and *John Ellis* of the second part; and *Robert Wynne* and *Owen Holland* of the third part;—and by a common recovery suffered, in pursuance thereof, at the Great Sessions for the county of *Caernarvon*, on the 8th September, 1750, certain messuages, lands, tenements, and hereditaments, the estate and inheritance of the said *Humphrey Roberts*, and certain other messuages, lands, and hereditaments, the estate and inheritance of the said *Catherine Roberts*, and certain other messuages, lands, hereditaments, and premises, therein described to have been theretofore purchased by the said *Humphrey Roberts*, and all other the messuages, lands, and hereditaments, whatsoever, of them, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, or any of them, in the parishes therein mentioned, and elsewhere, in the parish of *Caernarvon*, with their appurtenances, were limited to the use and behoof of such person and persons, and for such estate and estates,

and subject to such provisoess, powers, limitations, trusts, conditions, and agreements, as the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, at any time or times there-after, during the term of their natural lives, by any their joint deed or deeds, writing or writings, to be by them duly executed in the presence of two or more credible witnesses, should direct, limit, and appoint; and, in default of such direction, limitation, or appointment, to the use and behoof of such person or persons, for such estate and estates, and subject to such provisoess, powers, limitations, and agreements, as the said *Humphrey Roberts* and *Dorothy* his wife, and *Mary Roberts* (in case they should all of them survive the said *Catherine Roberts*), should at any time or times after the decease of the said *Catherine Roberts*, by any their joint deed or deeds, writing or writings, to be by them executed in the presence of two or more credible witnesses, direct, limit, or appoint; and, for default of, and until, such direction, limitation, and appointment, respectively, as aforesaid, as to certain parts of the said hereditaments, to the use of the said *Catherine Roberts*, and her assignes; for her life, without impeachment of waste; and as to, as well the said last-mentioned messuages, lands, and hereditaments so limited to the said *Catherine Roberts*, for her life, as aforesaid, from and after her decease, as also, as to all the rest and residue of the said messuages, lands, hereditaments, and premises therein-before mentioned, whereof such common recovery should be had and suffered as aforesaid, and whereof no use was therein-before limited and declared, to the use and behoof of such person and persons, and for such estate and estates, and subject to such provisoess, powers, limitations, trusts, conditions, and agreements, as the said *Humphrey Roberts*, at any time or times thereafter, during the term of his natural life, by any his deed or deeds, writing or writings, to be by him duly executed in the presence of two or more credible witnesses, or by his

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last will and testament in writing, to be by him the said *Humphrey Roberts* also duly executed in the presence of three or more credible witnesses, should direct, limit, or appoint; and, for default of, and until, such direction, limitation, and appointment, to the use and behoof of the said *Humphrey Roberts*, his heirs and assigns for ever.

By indentures bearing date respectively the 1st and 2nd days of *October*, 1751,—the former being a lease for a year, and made between the said *Humphrey Roberts* and *Dorothy* his wife, the said *Mary Roberts*, and *Catherine Roberts*, of the one part; and *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, of the other part; and the latter being tripartite, and made between *Robert Wynne* the elder, and *Robert Wynne* the younger, son and heir apparent of the said *Robert Wynne* the elder, of the first part; the said *Humphrey Roberts* and *Dorothy* his wife, and the said *Mary Roberts*, and *Catherine Roberts*, of the second part; and the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, of the third part;—after settling divers messuages, lands, and hereditaments, belonging to the said *Robert Wynne* the elder, and *Robert Wynne* the younger, to the uses therein mentioned, it was witnessed—“ That, in consideration of a marriage then intended to be had and solemnized between the said *Robert Wynne* the younger, and the said *Mary Roberts*, and of the provision therein-before made for her and her issue, and for the settling the messuages, lands, tenements, hereditaments, and premises therein-after mentioned, to the uses therein expressed concerning the same, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, did grant, bargain, sell, release, and confirm, direct, limit, and appoint unto the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, in their actual possession being, by virtue of the said lease for a year made to them by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Ro-*

*berts*, and *Catherine Roberts*, as therein mentioned, the several messuages, lands, tenements, and hereditaments, therein particularly described (and which, in fact, included the messuages, lands, tenements, and hereditaments, comprised in the said indentures of the 1st and 2nd of June, 1750, and whereof such recovery was suffered as aforesaid), with their and every of their appurtenances, and all other the messuages, lands, tenements, and hereditaments, situate, lying, and being, in the said county of *Caernarvon*, whereof or wherein the said *Humphrey Roberts* then was seised of any estate of inheritance, in possession, reversion, remainder, or use, and all the reversion and reversions, remainder and remainders, &c., and all the estate, right, title, interest, use, trust, possession, property, claim, and demand, whatsoever, of them, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, or any of them, of, in, and to, the same hereditaments and premises, and every of them, and every part and parcel thereof:—to have and to hold all and singular the said messuages, lands, tenements, hereditaments, and premises therein-before last granted and released, or mentioned or intended so to be, and every part and parcel thereof, unto the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, their heirs and assigns, for ever, to the several uses, intents, and purposes, and under the provisoes, powers, limitations, and agreements therein-after mentioned, expressed, limited, and declared, of and concerning the same respectively; that is to say, in the meantime, and until the said then intended marriage should take effect, to the same uses and estates as the said hereditaments and premises then respectively stood limited; and, from and immediately after the solemnization of the said then intended marriage, as to part of the lands, hereditaments, and premises therein comprised, to the use and behoof of the said *Humphrey Roberts* and *Dorothy* his wife, and their assigns, for and during the term of

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their natural lives, and the life of the longer liver of them, without impeachment of or for any manner of waste during the life of the said *Humphrey Roberts* only, for, and as the jointure of the said *Dorothy*, and in full satisfaction, lieu, and bar, of her dower or thirds out of any real estate whereof the said *Humphrey Roberts* then was, or should at any time thereafter, during her coverture, be seized; and as to, for, and concerning, other part of the lands and hereditaments therein mentioned and described, to the use and behoof of the said *Humphrey Roberts*, and his assigns, for and during the term of his natural life, without impeachment of waste; and as to, for, touching, and concerning, certain other parts of the lands, hereditaments, and premises, therein mentioned (being the same lands, hereditaments, and premises, as were limited to *Catherine Roberts*, for life, by the deed of 1750), to the use and behoof of the said *Catherine Roberts*, and her assigns, for and during the term of her natural life, without impeachment of waste; and as to, for, and concerning, the several capital and other messuages, lands, tenements, hereditaments, and premises, thereinbefore limited to the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, for their lives respectively, as aforesaid, from and after the respective determinations of the several estates thereof, to the use and behoof of the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, and their heirs, for and during the term of the natural lives of the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, respectively, in trust only to preserve the contingent uses and estates therein-after limited and declared, from being barred and destroyed; and, to that end, to make entries as often as occasion should require; but, nevertheless, to permit and suffer them, the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, respectively, to receive and take the rents, issues, and profits thereof, during their respective natural lives;

and as to, as well the said premises so limited to, and to the use of, the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, respectively, for their lives, as aforesaid, from and after the several deceases of them; the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, respectively, and as the said estates should end and respectively determine; as also the rest and residue of all and singular the premises therein-before mentioned, and whereof no use was therein-before limited or declared, to the use and behoof of the said *Robert Wynne* the younger, and the said *Mary*, his intended wife, for the term of their natural lives, and the life of the longest liver of them, without impeachment of waste; and, from and after the determination of that estate, to the use and behoof of the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, and their heirs, during the lives of the said *Robert Wynne* the younger, and the said *Mary*, his intended wife, respectively, in trust, to preserve contingent remainders; and from and immediately after the decease of the survivor or longest liver of them the said *Robert Wynne* the younger and *Mary* his intended wife, to the use and behoof of the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, their executors, administrators, and assigns, for the term of *five hundred* years from thence next ensuing; nevertheless, upon the trusts, and for the intents and purposes, therein-after mentioned; and, from and after the determination of the said term and estate of and for *five hundred* years, to the use of the first son of the said *Robert Wynne* the younger, by the said *Mary*, his intended wife, lawfully to be begotten, and the heirs of the body of such first son lawfully issuing; and, for default of such issue, to the use of the second and every other son of the said *Robert Wynne* the younger, by the said *Mary*, his intended wife, lawfully to be begotten, severally and successively, in tail, with remainder to the use

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of the daughters of the said *Robert Wynne* the younger, by the said *Mary*, his intended wife, in tail, with remainder to the use of the said *Humphrey Roberts*, his heirs and assigns, for ever: and it was thereby declared and agreed, that, as well as to the said term of *five hundred years*, as also as to another term of *five hundred years* thereby created and limited of and in the estates therein firstly settled, belonging to the said *Robert Wynne* the elder, and *Robert Wynne* the younger, the same were so created and limited upon trust, that, in case there should be one or more younger child or children, sons or daughters of the said *Robert Wynne* the younger, by the said *Mary* his intended wife, lawfully begotten, other than and besides such as should be immediately inheritable to the said premises, respectively, by virtue of the limitations therein-before contained, that then the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwic*), and *Pierce Wyane*, and the survivor or survivors of them, and the executors and administrators of such survivor, should, by sale or mortgage of the said terms, or any part thereof, or out of the rents, issues, and profits of the said premises, during the said term, after the death of the said *Robert Wynne* the younger, or in his life-time if he should signify his consent thereto, as therein mentioned, so as that thereby none of the prior estates in any part of the said premises therein-before limited should be thereby impeached or incumbered during the respective continuances thereof, raise and levy such sum and sums, not exceeding *6,000L*, as the said *Robert Wynne* the younger, by any writing or writings under his hand and seal, attested by two or more credible witnesses, or by his last will, to be by him duly published in the presence of three or more credible witnesses, should direct or appoint, and for want of such direction or appointment, then to raise or levy the whole *6,000L* in the manner following:—that is to say, one moiety thereof out of the premises thereby granted and released by the said *Robert Wynne* the elder, and *Robert Wynne* the younger, and the other

moiety thereof out of the premises thereby granted and released by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*; and to pay the same to and for the portion and portions of such younger child or children as therein mentioned. And it was by the same indenture provided, declared, and agreed, that, if the said sum of 6,000*l.*, or such part thereof as the said *Robert Wynne* the younger should so direct to be raised, should be paid by the person or persons who should be entitled to the freehold and inheritance of the said premises for the time being, then and from thenceforth the said two several terms of *five hundred years and five hundred years* should cease, determine, and be utterly void; and by the same indenture of the 2nd *October*, 1751, the said *Humphrey Roberts*, for himself and the said *Dorothy* his wife, and the said *Mary Roberts* and *Catherine Roberts*, for themselves, did severally and respectively, and for their several and respective heirs, executors, and administrators, and not the one for the other, or the acts, deeds, &c., of the other of them, covenant, promise, and agree, to and with the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (*of Garthwin*), and *Pierce Wynne*, their executors and administrators, that they, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, at and immediately before the sealing and delivery of the same indenture, were, or one of them was, lawfully, rightfully, and absolutely seized of and in all and singular the messuages, lands, tenements, and hereditaments by them thereby granted and released, or intended to be granted or released, for a good, sure, absolute, and indefeasible estate of inheritance, and then had, or one of them had, in themselves or himself, full power, lawful and absolute authority, to grant, bargain, sell, convey, release, and settle the same premises to and for the uses, intents, and purposes, and in manner therein-before mentioned, touching and concerning the same; and that all the same premises then were, and so from thenceforth should remain and continue, free

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and clear, or otherwise by them the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, their heirs, executors, administrators, and assigns, or some of them, well and sufficiently saved, kept harmless, and indemnified, of, from, and against all and all manner of former and other gifts, grants, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, or wittingly or willingly suffered, by them the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, or by, through, with, or under their act or acts, means, consent, neglect, default, privity, or procurement; and, further, that they, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, and their respective heirs, and all and every other person or persons whatsoever, having, or lawfully claiming, any estate or interest of, in, to, or out of the same premises, or any part thereof, from, by, or under them, or any of them, should and would, from time to time, and at all times there-after, at or upon the reasonable request of the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, their heirs and assigns, at the proper costs and charges of the said *Humphrey Roberts*, his heirs or assigns, make, do, acknowledge, levy, execute, and suffer or cause to be made, done, acknowledged, levied, executed, and suffered all and every such further and other act and acts, thing and things, assurances and conveyances in the law, whatsoever, for the further, better, and more perfect assuring, settling, and confirming, of all and singular the said premises therein-before mentioned, or thereby intended or agreed to be by them released, settled, or assured, or any part thereof, to the uses, intents, and purposes therein-before expressed and declared concerning the same respectively, as by the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*) and *Pierce Wynne*, their heirs or assigns, or their or any of their counsel learned in the law, should be reasonably devised, advised, or required.

The said indenture of the 2d *October*, 1751, was duly executed by the said *Robert Wynne* the elder, and his execution thereof attested by two witnesses; and was duly executed by *Robert Wynne* the younger, and his execution thereof attested by three witnesses; and was also duly executed by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, and their respective executions thereof attested by three witnesses.

The marriage between the said *Robert Wynne* the younger, and the said *Mary Roberts*, was solemnized shortly after the execution of the said last-mentioned indenture.

There was issue of the said intended marriage, only one son, *viz.* *Robert Watkin Wynne*, and one daughter, *viz.* *Jane*, who afterwards became the wife of *John Wynne Griffith*.

The said *Catherine Roberts* died in the year 1763; the said *Humphrey Roberts* in the year 1766; and the said *Dorothy Roberts* in the year 1767.

The said *Robert Wynne* the younger departed this life in the year 1782, leaving the said *Mary* his wife, and the said *Robert Watkin Wynne*, his only son and heir-at-law, and the said *Jane* his daughter, and only other child, him surviving, having by his will, dated the 24th day of *September*, 1767, directed that the whole of the said portion of 6,000*l.* should be raised in favour of his said daughter *Jane*, and paid to her on her attaining the age of twenty-one, or marriage, as therein mentioned.

By an indenture of settlement, made on the marriage of the said *Jane* with the said *John Wynne Griffith*, and dated the 15th day of *February*, 1785, the said *Jane* assigned the said portion of 6,000*l.* to the said *Robert Watkin Wynne*, and *John Lloyd*, *Robert Wynne*, and *Bennett Williams*, Esquires, upon trust to pay 1000*l.*, part thereof to the said *John Wynne Griffith*, and, on receipt of the sum of 5,000*l.*, the residue thereof, to invest the same in the purchase of lands of inheritance, and settle the

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same, in strict settlement, for the benefit of the said *John Wynne Griffith*, and *Jane* his wife, and their issue, as therein mentioned: but the settlement did not expressly authorise the said trustees to give discharges for the money.

By indentures of the 4th and 5th of *October*, 1805, the said *Robert Watkin Wynne* conveyed an estate called *Plasnewydd* estate, being part of the settled estates, to the use of the said *John Wynne Griffith*, *Robert Watkin Wynne*, and *Edward Lloyd*, upon trust to sell, and out of the monies to arise thereby, to pay off the remainder of the said portion of £6,000.

By an indenture dated the 24th of *December*, 1812, after reciting that the sum of £4,300, the then remainder of the said portion, had been paid to the said *John Lloyd*, the surviving trustee of the said marriage settlement of the said *John Wynne Griffith*, and *Jane* his wife, they the said *John Lloyd*, *John Wynne Griffith*, and *Jane* his wife, released the said *John Wynne Griffith*, *Robert Watkin Wynne*, and *Edward Lloyd*, and the estates comprised in the said indenture of settlement of the 1st and 2nd days of *October*, 1751, of and from the same.

The said *Robert Watkin Wynne* died in the year 1806, in the life-time of his said mother, *Mary Wynne*, and without having barred the entail, leaving *John Wynne*, his eldest son and heir-at-law, him surviving. The said *Mary Wynne* died in *January*, 1814.

By indentures of lease and release, bearing date respectively the 10th and 11th days of *March*, 1814, and made, and duly executed, between the said *John Wynne*, who was therein described as the eldest son and heir-at-law of the said *Robert Watkin Wynne*, who was the only son of *Robert Wynne*, by *Mary*, his late wife, deceased, of the first part; *John Oldfield* of the second part; and *Sir Thomas Mostyn*, Bart., of the third part; whereby—after reciting (among other things) the said indentures of the 1st and 2nd days of *October*, 1751, and that the said *Robert Watkin Wynne* died in *March*, 1806, without having done any

act to bar the estate-tail, which became vested in him in remainder under the said last-mentioned indenture—it was witnessed, that the said *John Wynne*, for barring and destroying the estate-tail, then vested in him, of and in all the messuages, lands and hereditaments therein mentioned, and for assuring the same to the uses limited and declared of and concerning the same, did grant, release, and confirm unto the said *John Oldfield*, and his heirs, the said settled estates in the said county of *Caernarvon*, to hold the same unto and to the use of the said *John Oldfield*, his heirs and assigns, for ever; to the intent that the said *John Oldfield* might be tenant of the *præcipe* to a common recovery to be suffered of the said premises, and which said recovery, when suffered, it was thereby declared, should enure to the use of such person or persons, and for such estate or estates as the said *John Wynne* should, in manner therein mentioned, appoint; and in default thereof, to the use of the said *John Wynne*, and his assigns, for his life, without impeachment of waste; with remainder to the use of the said *Sir Thomas Mostyn*, and his heirs, during the life of the said *John Wynne*: in trust, nevertheless, for him, the said *John Wynne*; with remainder to the use of the right heirs of the said *John Wynne*, for ever. And which said recovery was afterwards duly had and suffered, at the *Caernarvonshire Great Sessions*, on the 4th day of *April*, 1814.

By a decretal order of the High Court of *Chancery*, made on the 5th day of *August*, 1822, in a cause in which the said *John Wynne* was plaintiff, and the said *John Wynne Griffith* and others were defendants, it was declared that the said portion of 6,000*l.* had been fully paid and satisfied, and that the said term of *five hundred* years had ceased and determined.

The question for the opinion of the Court was, whether, under the said indentures of the 1st and 2d days of *June*, 1750, and the common recovery suffered in pursuance thereof, and the said indentures of the 1st and 2nd days of *Octo-*

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ber, 1751, the legal fee of such of the estates and premises comprised in the said first-mentioned indentures as were settled and assured by the said last-mentioned indentures, became vested in the said *William Mostyn, John Lloyd, Robert Wynne* (of *Garthwin*), and *Pierce Wynne*; and, if so, whether a jury would be directed to presume a re-conveyance of the said legal estate to the uses specified in that deed.

The case came on for argument on a former day in this term, *viz.* on the 14th instant.

Mr. Serjeant *Bosanquet* for the plaintiff.—The question is, whether the deeds of the 1st and 2nd October, 1751, operated as an appointment under the power contained in the deed of 1750, or as a conveyance. They clearly operated as a conveyance, by virtue of the seisin of *Humphrey* and *Catherine Roberts*. The evident intention of the parties was, to convey to uses capable of execution by the statute. Except in the words of the grant, there is no reference to, or recital of, the power; nor is there any intent of exercising it either expressed or implied. Although the words "direct, limit, and appoint," are introduced, still they were either used *ex abundanti cautela*, or crept in through mistake, and can have no operation in point of law; for the different parts of the deeds shew that the parties were acting by virtue of their ownership and not by virtue of the power. It was not intended to vest the legal estate in the trustees; for the only important duty that attached to them, related to the term of 500 years, which was evidently a legal and not an equitable term; and the Court will so construe a deed as to give it a complete legal effect, due regard being had to the intention of the parties. The deeds of 1750 shew that, at the time they were executed, the entire seisin was in *Humphrey Roberts* and *Dorothy* his wife; they, therefore, might have conveyed by common-law assurance without reference to the power; and if they had so done the power would have been extinguished,

as it was in the nature of an ownership, and might be released, and was not a mere naked authority; and if either of the four grantors had done any act to extinguish the power, its operation would have been destroyed *pro tanto*. As, therefore, it was competent either to the four grantors to exercise their power and put an end to the ownership, or to the two to exercise their ownership, and put an end to the power, the only question is, what is the effect of the acts they have done, consistently with the rules of law. Now it is an established rule, that, where a party has an interest and an authority at the same time, and he does an act generally, it shall be construed in relation to his interest and not to his authority; and that rule is founded on Sir *Edward Clere's* case (*a*), where it was resolved, "if a man, seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates, as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. When a man makes a feoffment to the use of his last will, he has the use in the mean time. If in such case the feoffor, by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory: but, if, in such case, the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate deviseable in him, and power also to limit an use, and he had election to pursue which of them he would; and, when he devised the land itself without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land, by his will, and not to limit an use according to his authority; and in such case,

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the land being held *in capite*, the devise is good for two parts, and void for the third part; for, as the owner of the land, he cannot dispose of more; and in such case the devise cannot take effect by the will for two parts, and by the feoffment for the third part; for he made his devise as owner, and not according to his authority, and his devise shall be of as much validity as the will of every other owner having any land held *in capite*." The rule as laid down in *Cox v. Chamberlain* (*a*), is, that an instrument like the present, is to be considered either as an appointment or a release, as it will best effect the intention of the parties:— There, a man having a general power of appointment, with a limitation, in default of appointment, to himself, in fee, by lease and release, *in pursuance of all powers* in him vested, did grant, bargain, sell, alien, remise, release, and confirm, limit, declare, and appoint the estate to trustees, to uses; and Lord *Alvanley*, the Master of the Rolls, held that the deed operated as a conveyance of the interest, and not as an execution of the power, and said (*b*), "I am clearly of opinion, upon every principle upon which the Court acts with regard to the construction of conveyances, that it would be monstrous in this case to hold, that, where there is a power and an interest, and, the act being equivocal, it is doubtful whether be acted under the one or the other, the Court should adopt that which would defeat the instrument." That case is not only very similar to the present, but is consistent with all the previous and subsequent decisions. Although it may be said that its authority has been impugned by *Roach v. Wadham* (*c*), (which may be relied on to shew that the deeds of 1751 operated as an appointment only under those of 1750); yet in that case, although there were words of appointment as well as of conveyance, it was held, that the purchaser took by appointment; but that was because the instrument, though more properly adapted to pass an interest, and containing words of grant for that purpose, professed, in

(*a*) 4 Ves. 631.(*b*) Id. 637.(*c*) 6 East, 289.

terms, to be an appointment. It was obviously for the benefit of the purchaser, to take by appointment; and it appeared that the intention of the parties could only be effectuated by considering the instrument as an appointment; and at the conclusion of the argument Lord *Ellenborough* said (*a*): "This is a conveyance with a double aspect, having words which indicate an intention to pass an interest, and to limit an use, and to be taken either as a conveyance or as an appointment. We will therefore look into the deeds and see which is the predominant intention;" and in delivering the judgment of the Court, he said: "It was agreed that the only point was, whether the conveyance operated on the interest which *Watts* (the donee) had, or as an execution of the power; and that it was a question of mere intention. The making him join in the lease and release, as a party conveying, proceeded, as we conceive, only from the common caution of conveyancers, who, where a man has a power of appointment over land as well as an interest in it, make him both appoint and convey, in order that, if there should be any defect in the creation, continuance, or execution of the power, the conveyance may operate upon his estate and interest." Here, however, it was neither the intention of the parties, nor could it be beneficial to them, that the deeds of 1751 should operate as an appointment, and if the Court were so to hold, the legal estate would be conveyed to the four persons therein named, *viz.* *Mostyn*, *Lloyd*, *R. Wynne*, and *P. Wynne*. They are made trustees to preserve contingent remainders, which would have been unnecessary, as, in *Fearne on Contingent Remainders*. (*b*), it is said, that it is "now settled beyond dispute, that no limitations after a contingent limitation of the fee simple absolute can be vested;" and a distinction is drawn between cases where the limitation of the fee, in trust, is originally contained in and made by the conveyance itself, and those where its effect

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(*a*) 6 East, 302, 306.

(*b*) 6th Edit. 229.

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is referred to a subsequent direction or appointment. Besides, here, the term was declared to have been created for the purpose of raising portions for the younger children, and, if the legal estate passed to the trustees, the term would have merged in the fee. If the deeds be held to operate as an appointment, the words, "bargain, sell, release, and confirm," would be rendered inoperative as words of conveyance; but if they operate as such, the words "direct, limit, and appoint," must be taken to declare an intention to release and extinguish the power. In *Maundrell v. Maundrell*, Lord Eldon held, that where the act purports to pass the interest, it shall be considered so intended, and not to exercise an authority, and observed (a), "But it is said, there being a conveyance of the interest, subject still to the existence of the power, this must be taken to be an execution of the power, as well as a passing of the interest; otherwise the party might, by executing his power, destroy the interest. The answer to that is, that his power is gone. When he passes his whole interest, the power, though not exercised, is destroyed." Either the words of conveyance or those of appointment must be rejected; or, although it is informal to blend together the language of the appointment and the release, yet the words may be so marshalled as to give them all their intended effect, *viz.* by applying the words, "grant, bargain, and release," to those parties who have an interest in the property, and the words, "direct, limit, and appoint," to those who have only a power; for, Mr. Butler, in a note to *Coke Littleton* (b), says, "In the exercise of powers, conveyancers have introduced two precautions, which are often proper, but certainly sometimes superabundant: one is, to make the party exercising the power, declare, that he acts, not only in exercise of that particular power, but in exercise of every other power enabling him to do the act in question; the other is, where the party has a special power over land,

(a) 10 Ves. 259.

(b) Page 271, Note 231, III. 4.

and is also entitled to the fee, or to any particular estate carved out of it, he is made not only to exercise his power, but also to convey the land as owner of it. Thus, where a person, having a power of appointment, intends conveying his estate to a purchaser, he is made not only to appoint the fee, but to convey it by lease and release. Sometimes the appointment and the release are blended together; but this is very informal, and is always improper where it is not the intent of the deed that the party should have the legal estate. It may, however, be contended, that the Court would marshal the words, so as to give them all their intended effect; as, where a person having a power, is made to grant, bargain, sell, alien, release, limit, appoint, and confirm the lands to *A.* and his heirs, to the use of *B.* and his heirs, it may be contended, that the Court would construe the words *grant, bargain, sell, alien, release, and confirm*, as referrible to *A.* and his heirs, and the words *limit and appoint* as referrible to *B.* and his heirs. One reason for making the party in these cases both convey and appoint, is, that, if the power either was not well created, or is become suspended, and he has himself any estate in the land, the conveyance will operate on his estate."

But here, even assuming, that the deeds of 1751 operated by way of appointment, so as to vest the legal estate in the trustees, *Mostyn, Lloyd, R. Wynne, and P. Wynne*, a re-conveyance from them, ought, after so great a lapse of time, to be presumed, although the possession was originally not adverse; and more particularly so, as they have never acted under those deeds; and Courts of Equity, as well as Law, have always been strongly inclined in favour of such a presumption. In *Hillary v. Waller*; Sir *William Grant* said (*a*), "I agree that length of time does not by itself furnish the same sort of presumption in this case (the possession was under a trust,) that it does in a case of adverse possession. Long continued possession

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and clear, or otherwise by them the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, their heirs, executors, administrators, and assigns, or some of them, well and sufficiently saved, kept harmless, and indemnified, of, from, and against all and all manner of former and other gifts, grants, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, or wittingly or willingly suffered, by them the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, or by, through, with, or under their act or acts, means, consent, neglect, default, privity, or procurement; and, further, that they, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, and their respective heirs, and all and every other person or persons whatsoever, having, or lawfully claiming, any estate or interest of, in, to, or out of the same premises, or any part thereof, from, by, or under them, or any of them, should and would, from time to time, and at all times there-after, at or upon the reasonable request of the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, their heirs and assigns, at the proper costs and charges of the said *Humphrey Roberts*, his heirs or assigns, make, do, acknowledge, levy, execute, and suffer or cause to be made, done, acknowledged, levied, executed, and suffered all and every such further and other act and acts, thing and things, assurances and conveyances in the law, whatsoever, for the further, better, and more perfect assuring, settling, and confirming, of all and singular the said premises therein-before mentioned, or thereby intended or agreed to be by them released, settled, or assured, or any part thereof, to the uses, intents, and purposes therein-before expressed and declared concerning the same respectively, as by the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*) and *Pierce Wynne*, their heirs or assigns, or their or any of their counsel learned in the law, should be reasonably devised, advised, or required.

The said indenture of the 2d October, 1751, was duly executed by the said *Robert Wynne* the elder, and his execution thereof attested by two witnesses; and was duly executed by *Robert Wynne* the younger, and his execution thereof attested by three witnesses; and was also duly executed by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, and their respective executions thereof attested by three witnesses.

The marriage between the said *Robert Wynne* the younger, and the said *Mary Roberts*, was solemnized shortly after the execution of the said last-mentioned indenture.

There was issue of the said intended marriage, only one son, *viz.* *Robert Watkin Wynne*, and one daughter, *viz.* *Jane*, who afterwards became the wife of *John Wynne Griffith*.

The said *Catherine Roberts* died in the year 1763; the said *Humphrey Roberts* in the year 1766; and the said *Dorothy Roberts* in the year 1767.

The said *Robert Wynne* the younger departed this life in the year 1782, leaving the said *Mary* his wife, and the said *Robert Watkin Wynne*, his only son and heir-at-law, and the said *Jane* his daughter, and only other child, him surviving, having by his will, dated the 24th day of *September*, 1767, directed that the whole of the said portion of 6,000*l.* should be raised in favour of his said daughter *Jane*, and paid to her on her attaining the age of twenty-one, or marriage, as therein mentioned.

By an indenture of settlement, made on the marriage of the said *Jane* with the said *John Wynne Griffith*, and dated the 15th day of *February*, 1785, the said *Jane* assigned the said portion of 6,000*l.* to the said *Robert Watkin Wynne*, and *John Lloyd*, *Robert Wynne*, and *Bennett Williams*, Esquires, upon trust to pay 1000*l.*, part thereof to the said *John Wynne Griffith*, and, on receipt of the sum of 5,000*l.*, the residue thereof, to invest the same in the purchase of lands of inheritance, and settle the

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same, in strict settlement, for the benefit of the said *John Wynne Griffith*, and *Jane* his wife, and their issue, as therein mentioned: but the settlement did not expressly authorise the said trustees to give discharges for the money.

By indentures of the 4th and 5th of *October*, 1805, the said *Robert Watkin Wynne* conveyed an estate called *Plasnewydd* estate, being part of the settled estates, to the use of the said *John Wynne Griffith*, *Robert Watkin Wynne*, and *Edward Lloyd*, upon trust to sell, and out of the monies to arise thereby, to pay off the remainder of the said portion of £6,000.

By an indenture dated the 24th of *December*, 1812, after reciting that the sum of £4,000, the then remainder of the said portion, had been paid to the said *John Lloyd*, the surviving trustee of the said marriage settlement of the said *John Wynne Griffith*, and *Jane* his wife, they the said *John Lloyd*, *John Wynne Griffith*, and *Jane* his wife, released the said *John Wynne Griffith*, *Robert Watkin Wynne*, and *Edward Lloyd*, and the estates comprised in the said indenture of settlement of the 1st and 2nd days of *October*, 1751, of and from the same.

The said *Robert Watkin Wynne* died in the year 1806, in the life-time of his said mother, *Mary Wynne*, and without having barred the entail, leaving *John Wynne*, his eldest son and heir-at-law, him surviving. The said *Mary Wynne* died in *January*, 1814.

By indentures of lease and release, bearing date respectively the 10th and 11th days of *March*, 1814, and made, and duly executed, between the said *John Wynne*, who was therein described as the eldest son and heir-at-law of the said *Robert Watkin Wynne*, who was the only son of *Robert Wynne*, by *Mary*, his late wife, deceased, of the first part; *John Oldfield* of the second part; and *Sir Thomas Mostyn*, Bart., of the third part; whereby—after reciting (among other things) the said indentures of the 1st and 2nd days of *October*, 1751, and that the said *Robert Watkin Wynne* died in *March*, 1806, without having done any

set to bar the estate-tail, which became vested in him in remainder under the said last-mentioned indenture—it was witnessed, that the said *John Wynne*, for barring and destroying the estate-tail, then vested in him, of and in all the messuages, lands and hereditaments therein mentioned, and for assuring the same to the uses limited and declared of and concerning the same, did grant, release, and confirm unto the said *John Oldfield*, and his heirs, the said settled estates in the said county of *Caernarvon*, to hold the same unto and to the use of the said *John Oldfield*, his heirs and assigns, for ever; to the intent that the said *John Oldfield* might be tenant of the *præcipe* to a common recovery to be suffered of the said premises, and which said recovery, when suffered, it was thereby declared, should enure to the use of such person or persons, and for such estate or estates as the said *John Wynne* should, in manner therein mentioned, appoint; and in default thereof, to the use of the said *John Wynne*, and his assigns, for his life, without impeachment of waste; with remainder to the use of the said *Sir Thomas Mostyn*, and his heirs, during the life of the said *John Wynne*: in trust, nevertheless, for him, the said *John Wynne*; with remainder to the use of the right heirs of the said *John Wynne*, for ever. And which said recovery was afterwards duly had and suffered, at the *Caernarvonshire* Great Sessions, on the 4th day of *April*, 1814.

By a decretal order of the High Court of *Chancery*, made on the 5th day of *August*, 1822, in a cause in which the said *John Wynne* was plaintiff, and the said *John Wynne Griffith* and others were defendants, it was declared that the said portion of 6,000*l.* had been fully paid and satisfied, and that the said term of *five hundred* years had ceased and determined.

The question for the opinion of the Court was, whether, under the said indentures of the 1st and 2d days of *June*, 1750, and the common recovery suffered in pursuance thereof, and the said indentures of the 1st and 2nd days of *Octo-*

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ber, 1751, the legal fee of such of the estates and premises comprised in the said first-mentioned indentures as were settled and assured by the said last-mentioned indentures, became vested in the said *William Mostyn, John Lloyd, Robert Wynne* (of *Garthwin*), and *Pierce Wynne*; and, if so, whether a jury would be directed to presume a re-conveyance of the said legal estate to the uses specified in that deed.

The case came on for argument on a former day in this term, *viz.* on the 14th instant.

Mr. Serjeant *Bosanquet* for the plaintiff.—The question is, whether the deeds of the 1st and 2nd October, 1751, operated as an appointment under the power contained in the deed of 1750, or as a conveyance. They clearly operated as a conveyance, by virtue of the seisin of *Humphrey and Catherine Roberts*. The evident intention of the parties was, to convey to uses capable of execution by the statute. Except in the words of the grant, there is no reference to, or recital of, the power; nor is there any intent of exercising it either expressed or implied. Although the words "direct, limit, and appoint," are introduced, still they were either used *ex abundanti cautela*, or crept in through mistake, and can have no operation in point of law; for the different parts of the deeds shew, that the parties were acting by virtue of their ownership and not by virtue of the power. It was not intended to vest the legal estate in the trustees; for the only important duty that attached to them, related to the term of 500 years, which was evidently a legal and not an equitable term; and the Court will so construe a deed as to give it a complete legal effect, due regard being had to the intention of the parties. The deeds of 1750 shew that, at the time they were executed, the entire seisin was in *Humphrey Roberts* and *Dorothy his wife*; they, therefore, might have conveyed by common-law assurance without reference to the power; and if they had so done the power would have been extinguished,

as it was in the nature of an ownership, and might be released, and was not a mere naked authority ; and if either of the four grantors had done any act to extinguish the power, its operation would have been destroyed *pro tanto*. As, therefore, it was competent either to the four grantors to exercise their power and put an end to the ownership, or to the two to exercise their ownership, and put an end to the power, the only question is, what is the effect of the acts they have done, consistently with the rules of law. Now it is an established rule, that, where a party has an interest and an authority at the same time, and he does an act generally, it shall be construed in relation to his interest and not to his authority ; and that rule is founded on Sir *Edward Clere's* case (*a*), where it was resolved, "if a man, seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates, as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. When a man makes a feoffment to the use of his last will, he has the use in the mean time. If in such case the feoffor, by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will ; so that in such case the will is but declaratory : but, if, in such case, the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate deviseable in him, and power also to limit an use, and he had election to pursue which of them he would ; and, when he devised the land itself without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land, by his will, and not to limit an use according to his authority ; and in such case,

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quite clear that they contemplated something more, *viz.* to execute a conveyance at common law; and the only question is, which of the two intents predominates. It is clear both cannot take effect; and, if so, the rule laid down in Sir *Edward Clere's* case is directly applicable; and that rule has been confirmed by subsequent decisions. Here the deeds may operate as a conveyance by those parties who had an interest, and as an appointment by those who had none; and by marshalling or distributing the words in the deed, in the manner suggested by Mr. *Butler*, full effect will be given to it, and the intention of the parties satisfied.

The following certificate was on this day sent to the Master of the Rolls.

" We have heard this case argued by counsel, and, having considered the same, are of opinion, that, under the said indentures of the 1st and 2nd days of *June*, 1750, and the common recovery suffered in pursuance thereof, and the said indentures of the 1st and 2d *October*, 1751, the legal fee of such of the estate and premises, comprised in the said first-mentioned indentures, as were settled and assured by the said last-mentioned indentures, did not become vested in the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (*of Garthwin*), and *Pierce Wynne*.

W. D. BEST.  
J. A. PARK.  
J. BURROUGH.  
S. GASELEE."

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## JONES v. DE LISLE.

THE defendant in this case was arrested as the acceptor of a bill of exchange for 171*l.* 10*s.* The sheriff's officer suffered him to go at large, without taking from him a bail-bond, and returned *cepi corpus.* The defendant afterwards went to *Paris*, and, remaining there, judgment was signed against him as for want of a plea, and a writ of *capias ad satisfaciendum* was sued out on the judgment. The *capias* was returned *non est inventus*, and the plaintiff was subsequently served with notice of the allowance of a writ of error.

The Court, on motion, will not set aside the allowance of a writ of error.

Mr. Serjeant *Taddy*—on an affidavit setting forth the facts above stated, and that, to the belief of the deponent, the writ of error was sued out, at the instance of the sheriff's officer who made the arrest, and by his attorney, merely for delay—moved for a rule to shew cause why the allowance of the writ of error should not be set aside. The learned Serjeant submitted, that, the allowance of the writ being virtually the act of the Court, they had a discretionary power over it, which, under the peculiar circumstances of the case, they would be justified in exercising.

*Per Curiam.* We have no discretion. The writ of error issues from the Court of *Chancery*, and if it has been improperly obtained, it is there that application should be made; but we have no power to interfere. Our officer was bound to allow the writ, and might have been attached had he refused so to do. The allowance is by no means the discretionary act of the Court. In this case, perhaps, the plaintiff might move for execution notwithstanding.

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standing the writ of error; but, at all events, the course he has adopted is not the proper one.

The learned Serjeant, therefore, took nothing by his motion.

END OF TRINITY TERM.

AN

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### ACTION ON THE CASE.

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- Where an action was brought, and a verdict obtained, by two plaintiffs against a defendant, for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them:—The Court ordered the judgment to be arrested. *Barratt v. Collins, E. 6 G. 4.* *Page 446*

### ADMISSIONS.

*See EVIDENCE, 4.*

### AFFIDAVIT TO HOLD TO BAIL.

- On an affidavit of debt, sworn before, and filed with, the filacer for *Middlesex*, a *capias ad respondendum* issued to the Sheriff of that county, against the defendant, who not being found there, an office copy of the affidavit, certified by the filacer for *Middlesex*, was filed with the filacer for *Yorkshire*, on which another *capias* was issued into the latter county, instead of a *testatum*; whereupon the defendant was arrested:—*Held*, that this was irregular, as a fresh affidavit should have been sworn before the filacer for *Yorkshire*. *Dorville v. Whomwell, E. 6 G. 4.* *Page 318*
- An affidavit of debt, stating that R. S., H. A., R. R., and B. S., were jointly indebted to the plaintiff on a bill of exchange, “ accepted (in the name and firm of A. C. & Co.) by the said R. S., H. A., R. R., and B. S., or one of them:”—*Held*, insufficient. *Harmer v. Ashby, E. 6 G. 4.* *323*
- An affidavit to hold to bail stated, that “ the defendant was indebted

to the plaintiff in a certain sum, secured to the plaintiff by an indenture by which the defendant covenanted to pay certain specified sums, at certain times, and on certain events, which had passed and happened, and that such sums had not been paid."—*Held* sufficient. *Barnard v. Neville*, T. 6 G. 4.

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## AGENT.

*See ATTORNEY*, 1.  
*BROKER*.  
*FACTOR*.

1. An agent or servant can only act within the scope of his authority: therefore, declarations made by him as to a particular fact, are not admissible in evidence, unless they fall within the nature of his employment as such agent or servant. *Schumack v. Lock*, H. 5 & 6 G. 4.

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## AGREEMENT.

*See ASSOMPSIT*, 1, 2.  
*INSPECTION OF PAPERS*.  
*PARTNERS*, 2.

1. *A*. having undertaken to complete the carpenter's work in a house of the defendant, and to find all materials, and being unable to procure timber for that purpose, it was supplied by *B*., on the following undertaking being signed by the defendant: "I agree to pay *B*., for timber to a house situate, &c., out of the money that I have to pay *A*; provided *A*.'s work is completed."—*Held*, that this was not a collateral, but a direct undertaking by the defendant to pay upon the completion of the work; and that it was immaterial whether the work were done by *A*. or by another person. *Dixon v. Hatfield*, H. 5 & 6 G. 4.

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2. The defendants signed, and ad-

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dressed to the plaintiffs the following written agreement, viz.—" We hereby promise that your draft on *W. C. Son, & Co.*, due at Messrs. *Mastermans'*, at six months, due on the 27th Nov. next, shall then be paid out of money to be received from *St. Philip's Church*, say amount, 174l. 13s. 5d.:"—*Held*, that this was not an undertaking to bind the defendants within the statute of frauds, as no consideration for the promise appeared on the face of it. *Morley v. Boothby*, E. 6 G. 4. Page 395

## AMENDMENT.

*See PRACTICE*, 1.  
RECOVERY.

1. Where an action was brought, and a verdict obtained, by two plaintiffs against a defendant, for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them:—The Court ordered the judgment to be arrested. But the jury having, by their verdict, confined the damages to the expenses which the plaintiffs had been jointly put to in procuring their liberty, the Court ordered the *postea* to be amended. *Barratt v. Collins*, E. 6 G. 4. 446
2. Where, in an action of slander, for giving a servant a false character, a rule for a new trial was made absolute, and the plaintiff had leave to amend one of the counts of the declaration, in order that the words charged to have been spoken might be made to correspond with those proved at the first trial, the Court allowed a new count to be added, to enable the parties to try the merits at the second trial. *Wyatt v. Cocks*, T. 6 G. 4. 504

## ANNUITY.

1. The Court will not order an an-

nuity-deed, and other securities connected therewith, to be delivered up to be cancelled, although void under the statute 17 G. 3, c. 26, one of the grantors being an infant, and the memorial being defective; but will only set aside the warrant of attorney, and judgment entered up thereon. *Stortor v. Tomlins*, H. 5 & 6 G. 4. Page 172

2. The defendant, for the purpose of redeeming or paying off two annuities previously granted by him (the consideration for which was 630*l.*), together with arrears and charges thereon, granted another annuity in consideration of 910*l.* That sum having been paid to him by the grantor's agent, he, at the desire of the latter, immediately returned to him the whole sum, to pay off the former annuities and charges (amounting to 751*l.*), and the costs of the negotiation (which were 158*l.*), and received from the agent only 1*l.* as the balance of the account:—The Court ordered the deeds to be delivered up to be cancelled, and a judgment entered up thereon to be vacated. *Henry v. Taylor*, T. 6 G. 4. 588

## APPOINTMENT.

*See* POWER, 1.

## ARBITRATION.

*See* AWARD.

## ARREST.

*See* PRACTICE, 6.

## ARREST OF JUDGMENT.

*See* PLEADING, 2.  
PRACTICE, 8.

## ASSAULT.

*See* COSTS, 5.  
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## ASSIGNEES.

*See* BANKRUPT.

## ASSUMPSIT.

*See* AGREEMENT.

ATTORNEY, 2.

AWARD, 2.

BARON AND FEME.

PLEADING, 2, 4.

- Where, the plaintiff having verbally agreed with *J. S.* for the purchase of houses, the defendant agreed, in writing, to give the plaintiff 40*l.* for his bargain, and the conveyance was afterwards made by *J. S.* to the defendant's wife, at his request:—*Held*, that the transfer of the bargain so made by the plaintiff with *J. S.* was a good consideration for the defendant's promise, and that a declaration in *assumpsit*, stating the consideration to be, that the plaintiff would relinquish the bargain to the defendant, and afford him an opportunity of becoming the purchaser, and that he had done so, was sufficient:—*Held* also, that the conveyance executed to the defendant's wife, as his nominee, supported an averment, that the defendant himself became the purchaser. *Seaman v. Price*, H. 5 & 6 G. 4. Page 34
- The plaintiff, the defendant, and one *J. C.*, being jointly concerned in trade, *J. C.* consigning goods to the defendant to sell on the joint account, the profits being to be divided equally between them; bills of exchange were given in payment for them by *J. C.* which were drawn by him on the plaintiff. The latter having expressed a reluctance to accept the bills without security, the defendant undertook to provide for them when at maturity, out of the proceeds of sales already in his hands:—*Held*, that the plaintiff, having accepted and paid the bills, might recover against

the defendant on a count for money had and received; although he had declared specially on the undertaking, and there was a variance between the contract alleged and that proved; and although it was objected that it was a partnership transaction, and that one partner could not maintain an action against another;—the money in the defendant's hands becoming, when the bills were paid by the plaintiff, separated from the partnership account. *Coffey v. Brian*, E. 6 G. 4. *Page 841*

3. The defendant having given the plaintiff, in payment for goods, certain bills of exchange which were afterwards dishonoured, the latter sued him for the price of the goods:—*Held*, that the plaintiff was not bound to produce the bills at the trial; and that the fact of their being in the possession of his agent at the time, did not bar his right of recovery. *Hadwen v. Mendizabel*, T. 6 G. 4. *477*

#### ATTACHMENT.

*See AWARD*, 4.

#### ATTORNEY.

*See PRACTICE*, 7, 9.  
*REPLEVIN*, 3.

1. An attorney's certificate having been, by his agent's mistake, filed in the Court of *King's Bench*, in which Court he had not been admitted, instead of this Court; and he, being sued for a debt in an inferior court, sued out a writ of privilege:—The Court ordered it to be quashed, and a *procedendo* to be issued. *Nixon v. Hewitt*, E. 6 G. 4. *270*
2. In an action brought by an attorney against two defendants, to recover the amount of his bill of costs, it appeared that he was employed by both, in the first in-

#### AWARD.

stance, but that one only undertook to pay; and the jury having found that the latter alone was liable, and given a verdict for the defendants:—The Court refused to set it aside, or grant a new trial. *Hellings v. Gregory*, E. 6 G. 4. *Page 837*

3. The defendant's attorney entered into the usual undertaking, under a judge's order, to pay the plaintiff the amount of his debt and costs, on the proceedings being stayed; and the defendant died before taxation:—*Held*, that the attorney was still bound to perform his engagement. *Hellings v. Jones*, E. 6 G. 4. *360*
4. An attorney, without being duly authorized by the tenant, commenced an action of replevin in his name against his landlord, and the tenant allowed the cause to be tried, and, having obtained a verdict, caused satisfaction to be entered on the record, the attorney's costs not being secured or paid:—The Court refused to vacate the entry, although the attorney insisted that it was made, through the collusion of the plaintiff and defendant, in order to deprive him of his costs. *Abbott v. Rice*, T. 6 G. 4. *489*

#### AUTHORITY.

*See AGENT*.

#### AVOWRY.

*See REPLEVIN*, 1, 2.

#### AWARD.

*See COSTS*, 3.

1. A verdict was taken for the plaintiff at *Nisi Prius*, by consent, with leave for the defendant to move to set it aside; a rule having been obtained accordingly, the Court ordered the verdict to stand, and the amount of damages to be referred to an arbitrator, who made his award in vacation:—*Held*, that

an application to set aside the award must be made within the first four days of the next ensuing Term. *Thompson v. Jennings*, H. 5 & 6 G. 4. *Page 110*

2. The plaintiff declared in *assumpsit*, that certain differences had arisen, and a certain suit was pending in Chancery, in which the plaintiff and divers other persons, including infants, were plaintiffs, and *P. K.*, *T. B.*, since deceased, and *J. R.*, defendants; and that it was ordered by the Vice-Chancellor, with the consent of the attorneys of the parties in the suit, that the several matters in question in the suit, and all disputes and differences then subsisting between certain of the plaintiffs, and *P. K.*, and *T. B.*, since deceased (being certain of the defendants), should be referred to the arbitrament of *W. C.*, who was to be at liberty to make one or more award or awards as he should think fit; and that, in case either of the parties should happen to die before the making of the award, the reference was not to abate, but the executors and administrators of the party so dying were to be considered and taken as parties to the order in like manner as their testator or intestate; that, before the making of the award, *T. B.* died, and the arbitrator afterwards awarded that the defendants, executors of *T. B.*, should, on &c. pay the plaintiff 225*l.* out of *T. B.*'s assets; by reason of which, the defendants, as executors, became liable to pay, and, being so liable, they, *executors as aforesaid*, promised to pay:—*Held*, on special demurrer, that the action was well brought against the executors; and that the declaration was sufficient; although it was objected, *first*, that the promise alleged to have been made by the defendants was a personal promise, and for which no considera-

tion was stated; *secondly*, that a sufficient authority to refer was not shewn, as it was made by the consent of the attorneys of the parties, some of whom were infants, who could not appoint an attorney; and, *lastly*, that the authority to refer was revoked by the death of *T. B.* *Dowse v. Coxe*, E. 6 G. 4.

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3. Three of five partners signed a submission to arbitration:—*Held*, that it did not bind the other two who had not signed, although the subject matter referred arose out of the business of the firm; it not being within the ordinary course of transactions in trade between partners. *Stead v. Salt*, E. 6 G. 4. 389
4. Partiality and improper conduct in an arbitrator form no answer to a motion for an attachment for not performing an award, although they may afford ground for setting aside the award. *Brazier v. Bryant*, T. 6 G. 4. *587*

## BAIL.

1. The time for justifying bail expiring on a *dies non*, the Court allowed them to justify on the following day, without a continuance of notice. *Pratt v. Oddy*, H. 5 & 6 G. 4. 95
2. The Court will not enlarge the time for bail to render their principal, on an affidavit that he is ill, and cannot be removed without endangering his life. *Warrington v. Sammell*, H. 5 & 6 G. 4. 170

## BAIL-BOND.

1. A defendant having been arrested by the initials of his christian name only, and having signed a bail-bond in like manner:—The Court ordered the bail-bond to be delivered up to be cancelled, and a common appearance entered; but said, that, if a party sign a written instrument by his initials only, and refuse to

give his full name on entering into a bail-bond, the Court will not relieve him on motion. *Fahrbroth v. Solliers*, *E. 6 G. 4.* Page 322

## BANKER.

*See BOND.*

## BANKRUPT.

*See SET OFF, 1.*

1. Where the defendant, by a deed, in the form of a devise, conveyed certain stock, premises, &c., to *B.*, on condition of his paying certain sums by way of rent, but which, in fact, amounted to the sum for which the defendant had agreed with *B.* to sell them to him, and 10*l. per cent.* interest for the time allowed on each payment, and *B.* was let into possession of the premises, and continued therein for four months, when he became bankrupt:—*Held*, that such deed was usurious; and that the property passed to the assignees of *B.*, under the statute of *James*, notwithstanding *B.*'s having obtained possession under the deed by means of fraud and misrepresentation as to his circumstances. *Sinclair v. Steavenson*, *H. 5 & 6 G. 4.* 46

2. In an action of trespass, by a bankrupt against his assignees, it appeared that the plaintiff, whilst a prisoner in the *King's Bench*, broke the rules by remaining a night at his house, when he caused his shop to be shut at an earlier hour than usual, and was denied to the clerk of a creditor. This was the only act of bankruptcy to support the commission. It was left to the jury to say, whether the shutting up the shop at an earlier hour than usual was not with a view to enable the plaintiff the better to cause himself to be denied to his creditors. The jury having found a verdict for the assignees—The

## BASTARDY-BOND.

Court refused to grant a new trial, which was moved for, on the ground that it should have been left to the jury to say, whether, the plaintiff being concealed at home for the night, the denial was not made in fear of a discovery, rather than for the purpose of avoiding a creditor. *Hughes v. Gilman*, *T. 6 G. 4.*

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## BARON AND FEME.

*See DOWER.*

1. If a wife leave the house of her husband under what a jury shall esteem a reasonable apprehension of personal violence, the husband is liable for necessaries subsequently furnished to her. *Houliston v. Smyth*, *T. 6 G. 4.* 482
2. The defendant, a baker and confectioner, was discharged under the Insolvent Debtor's Act, and the business, during his absence, and after his return from imprisonment, was carried on by his wife, who purchased goods in her own name. The wife was acknowledged by the landlord as tenant of the house in which they lived, and was rated in the books of the parish as the occupier. The defendant was aware of, and assented to, the dealings of his wife, and, living with her, partook of the profits of the trade:—*Held*, that he was liable in an action for the price of the goods, notwithstanding that the invoices were made out in the name of the wife alone, she being his agent. *Petty v. Anderson*, *T. 6 G. 4.* 577

## BASTARDY-BOND.

1. The putative father of an illegitimate child entered into a bond, with two sureties, to the churchwardens and overseers of a parish, to indemnify them against the expenses of providing for the child,

and, default having been made by the father, judgment was entered up on the bond, and the sureties were afterwards discharged under the Insolvent Debtor's Act:—*Held*, that they were still liable to the churchwardens and overseers for expenses incurred by the parish in respect of the child, subsequently to their discharge. *Davies v. Arnott*, T. 6 G. 4. Page 539

## BERWICK-UPON-TWEED.

*See PRACTICE*, 3.

## BILLS OF EXCHANGE.

*See ASSUMPTION*, 2, 3.

INSOLVENT DEBTOR, 1.

PARTNERS, 2.

1. Presentment of a bill of exchange at the house of a tradesman or merchant, between eight and nine in the evening:—*Held*, sufficient. *Triggs v. Nenham*, E. 6 G. 4. 249

2. The defendant having given the plaintiff, in payment for goods, certain bills of exchange, which were afterwards dishonoured, the latter sued him for the price of the goods:—*Held*, that the plaintiff was not bound to produce the bills at the trial; and that the fact of their being in the possession of his agent at the time, did not bar his right of recovery. *Hadwen v. Mendizabel*, T. 6 G. 4. 477

## BOND.

*See BAIL-BOND.*

BASTARDY-BOND.

REPLEVIN-BOND.

1. *J. S.* having an account with the plaintiffs, bankers, on which he was indebted to them in 10,247*l.* 9*s.* 1*d.*, the defendant, in 1822, as surety for *J. S.*, executed a bond to secure the payment, to the plaintiffs, of any sums which, for a certain

period, they might advance to *J. S.*, not exceeding in the whole 5000*l.*; and it was agreed that that bond was not to affect one which had been given by *J. S.* to the plaintiffs in 1817; but the defendant had no notice of the existence of the debt already due to the plaintiffs from *J. S.*.—*J. S.* afterwards became bankrupt, and was, at that time, indebted to the plaintiffs, on the old and new accounts generally, in the sum of 10,732*l.* 1*s.* 1*d.* The monies he had paid into the plaintiffs' bank subsequently to the execution of the first-mentioned bond exceeded 5000*l.*; but, at the time of paying those sums, it was not agreed that they should be placed to his credit on either the old or the new account exclusively; and *J. S.* saw the accounts every fortnight, receiving the vouchers half-yearly:—*Held*, that the defendant was liable to the extent of his security on the bond; and that the instrument was properly stamped with a 9*l.* stamp. *Williams v. Rawlinson*, E. 6 G. 4. Page 362

## BROKER.

*See AGENT.*

FACTOR.

1. The plaintiffs having been employed by the defendant to sell an estate for him, and being unable to do so, they applied to an attorney, who raised a sum by way of mortgage, but they did not interfere in the negotiation:—*Held*, that as they had assisted in procuring the loan, they were drivers of a bargain within the statute 12 Anne, stat. 2, c. 16, s. 2, and, therefore, only entitled to 5*s.* per cent. commission. *Pryce v. Wilkinson*, H. 5 & 6 G. 4. 177

2. *A. B.* and *C. D.* having agreed to purchase cottons on their joint account, *A. B.* directed his broker

to buy the same. The purchases having been made, *East India* warrants, or orders for delivery, were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of *A. B.* Immediately after the purchase, *C. D.* paid *A. B.* one half of the value of the cotton. When half the purchases had been completed, the brokers were apprized of the interest that *C. D.* had in the goods purchased. *A. B.*, after this, directed the brokers to procure him a loan on the security of the warrants; and *E. F.* advanced money by discounting bills drawn by *A. B.* upon the brokers, as a security for which the whole of the warrants were deposited with *E. F.* by the brokers. While they were so deposited, the brokers received directions, both from *A. B.* and *C. D.*, to make a division of the goods held on their joint account; which they did, by appropriating specific warrants to each party: and the division was approved of by both. After half the bills had been paid, the brokers were directed by *A. B.* to get the other half renewed, which *E. F.* agreed to do, and accordingly discounted fresh bills; and the brokers then left in the hand of *E. F.* as a security for the money last advanced, the warrants appropriated to *C. D.*, *E. F.* not then knowing that *C. D.* had any interest in them:—*Held*, that, by the division, the original lien of *E. F.* and the partnership, or tenancy in common, of *A. B.* and *C. D.* were determined; and that, that being so, the second pledge was the pledge of a specific chattel belonging to *C. D.*, which the brokers had no authority to make; and, consequently, that *C. D.* might maintain trover against *E. F.* to recover the goods so pledged. *Williams v. Barton*, T. 6 G. 4. Page 506

## COMMON.

## CARRIER.

1. In an action against a coach-proprietor for the loss of a parcel, in order to fix the plaintiff with the knowledge of a general notice, by which the defendant limited his responsibility, for parcels entrusted to him, to 5*l.*, unless entered and paid for accordingly, it was proved that the plaintiff had for three years taken in a newspaper in which the notice was advertised every week; and the jury having found a verdict for the plaintiff, the Court refused to grant a new trial. *Rowley v. Horne*, E. 6 G. 4. Page 247

## CERTIFICATE.

*See ATTORNEY*, 1.

## CHURCH-YARD.

*See TRESPASS*, 4.

## CODICIL.

*See DEVISE.*  
*WILL.*

## GOODS SOLD AND DELIVERED.

*See ASSUMPSIT*, 3.

## COMMITMENT.

*See JUSTICE OF THE PEACE*, 1.

## COMMON.

1. In an action of replevin for taking the plaintiff's cattle, the defendant avowed under a grant of common of pasture, from the lord of the manor to the burgesses of the borough of *A.*; and the plaintiff pleaded in bar, that the corporation of *A.* had been accustomed to appoint a reasonable and proper number of herds for (amongst other things) taking care of the cattle put upon the common; and also to appoint, for the pains of each such herd, a reasonable and proper number of stints of each of such

herds, to be depastured thereon :—*Held*, sufficient after verdict ; although it was urged that the number of herds and stints, and the duties required from the herds, should have been set out with certainty in the plea. *Elliott v. Hardy*, E. 6 G. 4. Page 347

#### CONSCIENCE, COURT OF.

*See INFERIOR COURT.*

#### CONSIDERATION.

*See AGREEMENT, 2.*

*ASSUMPSIT.*

*FRAUDS, STATUTE OF.*

#### CONTRACT.

*See AGREEMENT.*

*ASSUMPSIT.*

*COVENANT.*

#### CONVICTION.

*See JUSTICE OF THE PEACE, 1.*

*TRESPASS, 1, 2.*

#### CORN-FACTOR.

*See FACTOR.*

#### COSTS.

*See ATTORNEY, 2, 3, 4.*

*PRACTICE, 7, 8, 9.*

- Where a plaintiff was nonsuited in consequence of not producing formal proof of a private Act of Parliament, which the defendant's agents had previously agreed should be dispensed with, and the plaintiff obtained a rule to set aside the nonsuit and have a new trial, which was afterwards made absolute, but was silent as to costs, and the defendant obtained a verdict on the second trial :—*Held*, that the costs of the application for a new trial, not having been inserted in the rule, were to be considered and taxed as costs in the cause. *Truslove v. Burton*, H. 5 & 6 G. 4. 96

- Costs of a judgment as in case of a nonsuit, entered up against the plaintiff after his becoming bankrupt, cannot be set off by the defendant against the costs of another action, brought against him by the assignees, for the same cause. *West v. Pryce*, H. 5 & 6 G. 4.

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- An arbitrator, to whom all matters in difference between the plaintiff and defendants were referred, having directed a verdict to be entered for the plaintiff, in an action of trespass brought by him against the defendants, with 40*s.* damages, and found that 10*l.* were due from the former to the latter, for goods sold ; which sum he directed the plaintiff to pay the defendants within two months next after the date of the award ; and the plaintiff's costs of his action were taxed at 10*2*l.** :—*Held*, that the defendants could not set off the sum directed to be paid to them by the plaintiff, against such taxed costs, the time allowed for the payment of such sum not having expired when the application was made. *Young v. Gye*, H. 5 & 6 G. 4.

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- A plaintiff, who has obtained a verdict against a defendant, is entitled to his full costs, although the person who conducted his cause was not an attorney. *Reader v. Bloom*, E. 6 G. 4. 261
- To a declaration in trespass for assaulting the plaintiff, beating and kicking him, and tearing his clothes, the defendant pleaded that he was not guilty of the said supposed assaults, *in manner and form* as the plaintiff had complained against him. The jury having found a verdict for the plaintiff, damages 20*s.* and the Judge not having certified :—*Held*, that the plaintiff was entitled to no more costs than damages, as the plea in substance

denied the *battery* and tearing of the clothes, as well as the *assault*. *Weatherill v. Howard*, T. 6 G. 4.

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6. A plaintiff, a *Scotchman*, not actually domiciled in this country, but only occasionally residing here, is bound to give security for costs. *Naylor v. Joseph*, T. 6 G. 4. 522
7. Where there had been three trials, the verdict on, the first being for the plaintiff, and on the other two for the defendant (*viz.* on the second, by reason of the mis-direction of the Judge, and on the merits, on the third); and, by the rule for the first new trial, the costs were ordered to abide the event; but the second rule was silent as to costs:—The Court allowed the defendant to take, at his option, the costs either of the first or of the second trial, together with those of the last. *Body v. Esdaile*, T. 6 G. 4. 569
8. The Court refused to order the proceedings on a writ of right to be stayed, until payment by the tenant of the costs of a former action of ejectment between the same parties, for the recovery of the same premises. *Chatfield*, defendant; *Souter*, tenant; T. 6 G. 4. 572

#### COURT OF CONSCIENCE.

*See INFERIOR COURT.*

#### COVENANT.

1. In a declaration on a covenant by the vendee to pay certain annuities charged on land, and to indemnify the vendor against any action, suit, &c., in respect thereof—breach, for non-payment of the annuities, without alleging that the vendor was thereby damnedified:—*Held*, good on demurrer, the former covenant not being restrained or qua-

lified by the latter. *Saward v. Anstey*, H. 5 & 6 G. 4. *Page 55*

#### DAMAGES.

*See REPLEVIN-BOND*, 2.

#### DECLARATIONS.

*See EVIDENCE*, 1.

#### DEED.

*See DEVISE.*

FINE.

FORGERY.

INSPECTION OF PAPERS.

POWER.

POWER OF ATTORNEY.

1. *C.* and *H. R.*, being seised in fee of certain estates, by indentures of lease and release of the 1st and 2d June, 1750, and a common recovery suffered in pursuance thereof, settled them to such uses as *C.*, *H. R.*, and *D.* his wife, and *M. R.*, should, by their joint deed, executed in the presence of two witnesses, appoint; and, in default of such appointment, as to part, to the use of *C.* for life, and subject to *C.*'s life estate as to that part; and, as to the whole of the residue, in default of appointment, to the use of *H. R.* in fee. By indentures of lease and release, of the 1st and 2d October, 1751 (the execution of the parties to the release being attested by three witnesses), and made between certain persons therein named of the first part; *C.*, *H. R.*, and *D.* his wife, and *M. R.*, of the second part; and *W. M.*, *J. L.*, *R. W.*, and *P. W.*, of the third part; *C.*, *H. R.*, and *D.* his wife, did grant, bargain, sell, release, confirm, direct, limit, and appoint, unto *W. M.*, *J. L.*, *R. W.*, and *P. W.*, in their actual possession, being, by virtue of a lease for a year made to them by the said *C.*, *H. R.*, and *D.* his wife, and *M. R.*,

the same estates before mentioned, to hold to them the said *W. M.*, *J. L.*, *R. W.*, and *P. W.*, in fee, to the several uses therein mentioned and set forth:—*Held*, that, under the deeds of *June*, 1750, and the recovery suffered in pursuance thereof, and the deeds of *October*, 1751, the legal fee of such of the estates comprised in the first-mentioned deeds as were settled and assured by the last, did not vest in *W. M.*, *J. L.*, *R. W.*, and *P. W.*. *Wynne v. Griffith*, *T. 6 G. 4.*

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*Denn d. Nowell v. Roake*, *H. 5 & 6 G. 4.* *Page 113*

2. *A. C.* devised lands to her niece (*a feme covert*), for life, and her issue, remainder over, and appointed two trustees to receive the rents and keep the premises in repair, and gave them power to distrain, and grant leases for a limited period; and by a codicil she revoked the devise in the will, the trustees therein named having died, and devised the lands, in the same manner, to three other trustees named in the codicil:—*Held*, that the legal estate in such land vested in the new trustees. *Tenny d. Gibbs v. Moody*, *E. 6 G. 4.* *252*

3. A testator devised all his real and personal estates to trustees, and their heirs, upon trust to pay out of the rents 250*l.* yearly, towards the maintenance of his daughter, until she should attain 21, or marry with the consent of the trustees; and to apply so much of the residue of the rents, &c., as they should think necessary, for the maintenance of his son, until he should attain 21, or his sister should marry; and on his attaining 21, or the marriage of his sister, that the trustees should raise 5,000*l.*; by mortgage, sale, &c., of all or any part of the testator's messuages, &c., and stand possessed thereof, upon trust to pay the same, and the interest thereon, to the daughter, when she should arrive at 21, or marry; and, subject to the payment of such sum, that the trustees should stand seized of the residue of the testator's property, in trust for his son, until he should attain 21; and when he should have attained the age of 21, then to the use of, and in trust for, the son, his heirs, executors, administrators, and assigns, for ever; but, in case the son should not live to attain 21, and the daughter should

### DEMURRER.

*See PLEADING*, 1, 4.

### DEVISE.

*See EVIDENCE.*  
*WILL.*

1. A testatrix, being seised of one undivided moiety of an estate in *Surrey*, and having a power of disposing of the other moiety, of which power she was the creatrix, and having no other real estate there, devised all her freehold estate in *Surrey* to her nephew, *J. R.*, for life, on condition that, out of the rents thereof, he should, from time to time, keep such estate in proper and tenantable repair; and, on his decease, to and amongst his children equally, at 21, and their heirs, as tenants in common; and, in default of such children, remainders over to the other nephews and nieces of the testatrix:—*Held*, that the devise was a sufficient execution of the power, and that both moieties passed under it to the nephew; although it was objected that there was no reference to the power in the will, nor even an intent manifested by the testatrix, to pass the lands which were the subject of the power.

be living at the time of his decease; or, in case the son should live to attain 21, and afterwards die *without lawful issue*, then the testator devised his real estates to the use of the trustees, until the daughter should attain 21, or marry, and then to the use of his daughter, for life; remainder to the trustees to support contingent remainders; with divers remainders over. The son and daughter both attained 21, but the 5,000*l.* was not raised:—*Held*, that the legal estate in the real estates was veated in the trustees, and would continue so until the 5,000*l.* was raised, as directed by the will; and that the son would have taken an estate in fee in such estates, with an executory devise over, in the event of his dying without issue living at his death, in case the devise to him had been made without the intervention of trustees, he having attained the age of 21. *Glover v. Monckton*, T. 6 G. 4.

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4. The testator, by his will—reciting that he was seized of *divers freehold* messuages, and of *certain copyhold* lands, in the parish and manor of *I.*, *all which* freehold and copyhold lands were subject to a mortgage to *S. R.*—devised *all and every his several* freehold and copyhold messuages, &c., to *B. P.* and *W. A.*, and their heirs, upon trust, for certain purposes declared in his will; and he gave all the rest of his freehold, copyhold, and leasehold estates, and all his personalty, to his son *S. P.* The testator, at the time of making his will, and at the time of his death, was also seized in fee of twenty-one acres of land in *I.*, lying separate from, and unconnected with, the lands mortgaged to *S. R.*, and not included in that mortgage; as well as of leasehold estates elsewhere:—*Held*, that the twenty-

## EJECTMENT.

one acres not comprised in the mortgage, passed to the testator's son *S. P.*, under the residuary clause. *Pullin v. Pullin*, T. 6 G. 4.

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## DOWER.

1. A testator, being seised in fee, devised to his son *W. F.*, and his heirs, for ever, all his houses and lands, charged with an annuity to the testator's wife, for life; and if *W. F.* should have no children, child, or issue, the said estate, on the decease of *W. F.*, to become the property of the heir at law, subject to such legacies as *W. F.* may leave by will to any of the younger branches of the family. On the death of the testator, *W. F.* took possession of the lands devised, and died without issue, leaving his widow surviving, who afterwards intermarried with another:—*Held*, that she was entitled to dower out of the devised premises, but with a *cesset executio* during existing outstanding terms, to which they were subject. *Moody & Wife v. King*, E. 6 G. 4. 233

## EJECTMENT.

1. In ejectment to recover premises for non-payment of rent, a variance between the amount of rent stated in the particulars of demand of the lessors of the plaintiff, and the amount proved at the trial to be due:—*Held*, to be immaterial. *Tenny d. Gibbs v. Moody*, E. 6 G. 4. 252
2. A tenant having held over after the expiration of his term, the landlord took (amongst other things) severed crops under a writ of *habere facias possessionem*, issued on a judgment obtained against the former, in an action of ejectment:—The Court refused to grant a rule to refer it to the Prothonotary to ascertain the value

of such crops, or to order the landlord to pay over the balance to the tenant, after deducting the amount of rent due. *Doe d. Upton v. Witherwick, E. 6 G. 4.*

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3. Service of a declaration in ejectment, on one of two joint tenants, is good service; but, if the notice to appear be addressed to one only, by name, it is irregular, and will not entitle the lessor of the plaintiff to move for judgment against the casual ejector. *Doe d. Williamson v. Roe, T. 6 G. 4.* 493
4. In ejectment, a judgment signed against the casual ejector, and an execution sued out thereon, were withdrawn, the tenants in possession giving an undertaking to appear and enter into the common consent-rule, to plead *instanter*, and to accept short notice of trial; but they having failed to comply with such undertaking, and having offered no defence at the trial, final judgment was signed and costs taxed, when the lessor of the plaintiff was served with a rule for the allowance of a writ of error:—The Court, notwithstanding, permitted him to sue out execution on his judgment against the casual ejector. *Doe d. Morgan v. Fribby, T. 6 G. 4.*

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#### ERROR, WRIT OF.

*See EJECTMENT, 4.*

*PLEADING, 2, 3.*

*PRACTICE, 2, 12.*

#### ESTATE-TAIL.

*See DEVISE.*

*LIMITATION OF ESTATE.*

#### EVIDENCE.

*See CARRIER.*

*INQUISITION.*

*INSPECTION OF PAPERS.*

*TRESPASS.*

1. An agent or servant can only act

T T 2

within the scope of his authority: Therefore, declarations made by him as to a particular fact, are not admissible in evidence, unless they fall within the nature of his employment as such agent or servant. *Schumack v. Lock, H. 5 & 6 G. 4.*

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2. Devise to *R. P.* of "all that my freehold messuage, &c., situate, &c., wherein *R. P.* now lives;" and to *A. P.* of "all that my freehold messuage, &c., situate, &c., now in the occupation of *J. E.*"—A coal-cellar within the boundary of the premises devised to *A. P.*, had always been used by the testator, and was, at the time of the will, in the occupation of *R. P.*:—*Held*, that evidence of such occupation by him was conclusive, although it was proposed to shew that the cellar was situate within the boundary line of the house devised to *A. P.*; and, therefore, that it passed to *R. P.* under the will. *Press v. Parker, H. 5 & 6 G. 4.*
3. The stat. 1 & 2 G. 4, c. 87, does not require a corn-factor, under the 12th section, to return the name of the person to whom corn, when sold, is actually delivered. Where, therefore, corn-factors returned the name of *T. L.* as a buyer of wheat, and afterwards paid the lastage duty on the delivery of the quantity returned as sold to him:—*Held*, that they were not thereby precluded from shewing, that, although the corn was sold to *T. L.*, it was delivered to his granary-keepers on the condition that they were to hold it for the factors until *T. L.* had paid them for it. *Woodley v. Browne, H. 5 & 6 G. 4.*
4. *Quære*, whether an admission by the plaintiff's counsel, in his address to the jury on a former trial, that part of his client's demand had

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been satisfied, be receivable in evidence, if his client were in Court and heard it, and made no objection at the time? *Colledge v. Horn, E. 6 G. 4.* Page 431

5. In *trotter* against the sheriff for taking the plaintiff's goods, under an execution against a third person, the officer who levied was *subpoenaed*, but not with a *duces tecum*, and, when called, he stated that he had returned the warrant to the under-sheriff. The plaintiff had also served the attorney (on the record) for the plaintiff with a notice to produce the warrant; and it appeared that the defendant was in office at the time it was returned:—*Held*, that the notice to the defendant's attorney to produce the warrant, was equivalent to subpoenaing the under-sheriff to produce it, and entitled the plaintiff to give parol evidence of its contents. *Taplin v. Atty, T. 6 G. 4.*

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### EXECUTION.

*See EJECTMENT, 2, 4.*

1. The plaintiff, having obtained a verdict against the defendant, entered up judgment, and sued out execution against his goods,—the Court refused to allow the sum levied to be impounded in the hands of the sheriff, until an action, which the defendant had commenced against the plaintiff, as the acceptor of a bill of exchange, had been determined. *Williams v. Cooke, E. 6 G. 4.*

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### FACTOR.

*See AGENT.*

*BROKER.*

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### FALSE IMPRISONMENT.

*See AMENDMENT, 1.*

*JUSTICE OF THE PEACE, 1.*

### FINE.

*See RECOVERY.*

1. By a marriage-settlement, an estate was limited to the use of the husband, for life, remainder to the use of the wife, for life, remainder to the children of the marriage; and, in default of issue, to the use of such person as the wife should appoint; and, for default of such appointment, to the use of the right heirs of the survivor of the husband and wife, for ever; with power to the husband and wife to charge the estate; and a power to trustees, in whom the legal estate was vested, to sell, by the direction, and with the approbation of the husband and wife, or the survivor. The husband and wife borrowed a sum of money, by way of annuity; created a term of 500 years; and levied a fine to G., in fee, with a deed declaring the uses to be “in trust, to secure the regular payment of the annuity, and for corroborating and strengthening the said term.”—*Held*, that the fine did not operate to extinguish the power of the wife to consent to a sale of the settled estates, so as to prevent an exercise of the

power of sale by the trustees.  
*Tyrrell v. Marsh, E. 5 G. 4.*  
 Page 305

## FISHERY.

*See JUSTICE OF THE PEACE, 1.*

## FORGERY.

1. A power of attorney, under seal, for transferring government stock, is a *deed*; and the uttering of such an instrument, knowing it to be forged, is a capital offence, under the statute 2 Geo. 2, c. 25, s. 1. *The King v. Fauntleroy, H. 5 & 6 G. 4.* Page 1

## FORFEITURE.

*See EJECTMENT.*

## FORMEDON, WRIT OF.

1. The Court allowed the demandant, in a writ of *formedon*, to withdraw a demurrer, and reply, on payment of costs, on an affidavit which stated that his title had but recently accrued to him. *Cholmeley v. Paxton, E. 6 G. 4.* 246

## FRAUDS, STATUTE OF.

*See ASSUMPSIT, 1.*

1. Where the plaintiff, having verbally agreed with *J. S.* for the purchase of houses, the defendant agreed, in writing, to give the plaintiff 40*l.* for his bargain, and the conveyance was afterwards made by *J. S.* to the defendant's wife at his request:—*Held*, that the transfer of the bargain so made by the plaintiff with *J. S.* was a good consideration for the defendant's promise, and that a declaration in *assumpsit*, stating the consideration to be, that the plaintiff would relinquish the bargain to the defendant, and afford him an opportunity of becoming the purchaser, and

that he had done so, was sufficient:—*Held* also, that the conveyance executed to the defendant's wife, as his nominee, supported an averment that the defendant himself became the purchaser. *Seaman v. Price, H. 4 & 5 G. 4.* Page 34  
 2. The defendants signed, and addressed to the plaintiffs the following written agreement, viz.—“ We hereby promise that your draft on *W. C., Son, & Co.*, due at Messrs. *Mastermans'*, at six months, due on the 27th Nov. next, shall then be paid out of money to be received from *St. Philip's Church*, say, amount 174*l.* 13*s.* 5*d.*”—*Held*, that this was not an undertaking to bind the defendants within the statute of frauds, as no consideration for the promise appeared on the face of it. *Morley v. Boothby, E. 6 G. 4.* 395

## FRIENDLY SOCIETY.

*See JUSTICE OF THE PEACE, 2.*

## GOODS SOLD &amp; DELIVERED.

*See ASSUMPSIT, 3.*

## GUARANTIE.

*See FRAUDS, STATUTE OF.*

1. *A.* having undertaken to complete the carpenter's work in a house of the defendant, and to find all materials, and being unable to procure timber for that purpose, it was supplied by *B.* on the following undertaking being signed by the defendant:—“ I agree to pay *B.* for timber to a house situate, &c. out of the money that I have to pay”, provided *A.*'s work is completed:” *Held*, that this was not a collateral, but a direct undertaking by the defendant to pay upon the completion of the work, and that it was immaterial whether the work were

done by *A.*, or by another person.  
*Dixon v. Hatfield, H. 5 & 6 G. 4.*  
 Page 42

### HUSBAND AND WIFE.

*See BARON AND FEME.*

### INDICTMENT.

*See FORGERY.*

### INFANT.

*See AWARD, 2.*

### INFERIOR COURT.

*See ATTORNEY, 1.*

1. A writ of *accedas ad curiam* does not lie from a court of conscience to a superior court at *Westminster*; and where such writ was sued out by a defendant, to remove a plaint from the Court of Requests for the manors of *Sheffield* and *Ecclesall*, to the Court of *Common Pleas*, and he demanded a declaration before the return of the writ, the Court set aside the proceedings, with costs. *Bates v. Turner, H. 5 & 6 G. 4.* 32
2. And such writ was set aside, on motion. *Tingle v. Roston, H. 5 & 6 G. 4:* 171

### INQUIRY, WRIT OF.

*See INQUISITION.*

### INQUISITION.

1. On motion to set aside an inquiry, taken on a writ of inquiry before the under-sheriff, for excessive damages, the Court will not admit minutes of what passed before the under-sheriff to be read, unless verified by affidavit; and such motion cannot be supported on the affidavits of the parties themselves, unless corroborated by others. *Lathbury v. Brown, H. 5 & 6 G. 4.* 106

### INSPECTION OF PAPERS.

#### INSOLVENT DEBTOR.

1. An insolvent debtor applied for his discharge under the statue 1 *Geo. 4*, c. 119, and gave a creditor, who threatened to oppose him, a promissory note for the amount of his debt, and he accordingly withdrew his opposition, and the insolvent, after his discharge, was arrested on the note, but settled the action, by giving a warrant of attorney for the debt and costs, payable by instalments:—The Court set aside the warrant of attorney, and ordered an instalment paid by the insolvent to be returned to him, on the ground that the note and warrant of attorney were contrary to the policy of the statute, and operated as a fraud on the other creditors. *Rogers v. Kingston, H. 5 & 6 G. 4.* Page 97
2. The putative father of an illegitimate child entered into a bond, with two sureties, to the churchwardens and overseers of a parish, to indemnify them against the expenses of providing for the child, and, default having been made by the father, judgment was entered up on the bond, and the sureties were afterwards discharged under the Insolvent Debtor's Act:—*Held*, that they were still liable to the churchwardens and overseers for expenses incurred by the parish in respect of the child, subsequently to the discharge. *Davies v. Arnott, T. 6 G. 4.* 539

### INSPECTION OF PAPERS.

1. The plaintiff and defendant being about to enter into partnership together, a draft of an agreement was prepared by the defendant's attorney, which, having been perused and approved of by the plaintiff's attorney, was engrossed, and executed by the defendant, but was not executed by the plaintiff. The plaintiff afterwards brought an ac-

tion against the defendant for a breach of the agreement for the partnership, and applied for leave to inspect and copy the draft and deed:—The Court refused the application as to the deed, on the ground that the plaintiff, not having executed, had no interest in it; but they allowed it as to the draft, the plaintiff having an interest in that, and the defendant holding it as a trustee for him. *Ratcliffe v. Bleasby*, T. 6 G. 4. Page 523

## JOINT-TENANT.

*See EJECTMENT*, 3.

## JUSTICE OF THE PEACE.

1. A magistrate is bound by an erroneous commitment, notwithstanding a previous regular conviction: Where, therefore, a warrant of commitment, under the statute 5 Geo. 4, c. 14, for fishing in a private fishery, did not state that the offence was committed in *inclosed ground*:—*Held*, to be bad; and that an action for false imprisonment was maintainable against the magistrate issuing it. *Wickes v. Clutterbuck*, H. 5 & 6 G. 4. 63

2. Trespass does not lie against a magistrate for any thing done by him in the discharge of his duty, unless he be made acquainted with every fact necessary to enable him to determine, when called on to act. Where, therefore, the treasurer of a benefit society brought such action against a magistrate, for issuing a warrant of distress against him, upon a previous order of two magistrates, for the relief of a member, in pursuance of the statute 33 Geo. 3, c. 54, s. 15:—*Held*, that the action could not be maintained; it appearing on the face of the order, that the treasurer made no defence, the defendant's jurisdiction not having been ques-

tioned at the time, and the treasurer having neglected to present to his notice a rule of the society which directed all disputes between its members to be referred to arbitration; and which rule was confirmed by sect. 16 of the statute, whereby the award was made conclusive, without being subject to the control of the magistrates. *Pike v. Carter*, E. 6 G. 4.

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## LANDLORD AND TENANT.

1. A tenant having held over after the expiration of his term, the landlord took (amongst other things) severed crops, under a writ of *habere facias possessionem*, issued on a judgment obtained against the former in an action of ejectment:—The Court refused to grant a rule to refer it to the Prothonotary to ascertain the value of such crops, or to order the landlord to pay over the balance to the tenant after deducting the amount of rent due. *Doe d. Upton v. Witherwick*, E. 6 G. 4. 267

## LIBEL.

*See SLANDER.*

1. The plaintiff, a surgeon, and proprietor of a medical institution, having petitioned the House of Commons against quacks and empirics, the defendant, the proprietor of a periodical publication, in commenting on, and criticising, the plaintiff's petition, used expressions charging him with ignorance of his profession generally, and of chemistry in particular. The plaintiff sued the defendant, and declared against him for libelling him in his profession of a surgeon; and the jury were directed, that, if they thought the writing complained of to be no more than a fair comment on the petition, it was no

libel; and that they were to consider whether the publication imputed to the plaintiff ignorance in his profession of a surgeon, or merely ignorance of chemistry; and that, if they thought the latter, their verdict must be for the defendant. The jury having, accordingly, found a verdict for him, the Court granted a new trial. *Dunne v. Anderson*, E. 6 G. 4. Page 407

## LIEN.

*See BROKER.*

## LIMITATION OF ESTATE.

1. By a marriage settlement, an estate was limited to the use of J. G., for life, remainder to the use of the first son of J. G. upon A. S., his intended wife, and, for default of such issue, to the use of the second, third, and other sons of J. G. upon A. S., severally and successively, as they shall be in seniority of age, and of the several heirs male of their several bodies; and, for default of such issue, then, in case A. S. should be *enciente* by J. G. at the time of his death, to the use of T. P., until A. S. should be delivered, in trust for after-born child or children; and, in case such child or children should be a son or sons, to the use of such after-born son and sons severally and successively as they should be in priority of birth, and the heirs male of the body and bodies of each after-born son and sons. *Held*, that the eldest son of J. G., the settlor, took an estate tail under the above limitations. *Galley v. Barrington*, H. 5 & 6 G. 4. Page 21

## LIMITATIONS, STATUTE OF.

1. In *assumpsit*, for goods sold and delivered, the defendant pleaded the statute of limitations, in answer

to which, a letter was produced, addressed by the defendant to the plaintiff's attorney, as follows:—"I this day received your's respecting T. C.'s (the plaintiff's) demand: it is not a just one. I am ready to settle the account whenever T. C. (the plaintiff) thinks proper to meet me on the business. I am not in his debt 90*l.*, nor any thing like it. Shall be happy to settle the difference by his meeting me in *London*, or at my house. I shall write Mr. C. (the plaintiff) on the subject."—*Held*, sufficient to take the case out of the statute: and that the judge was warranted in telling the jury, that, after the letter, the statute was out of the question. *Colledge v. Horn*, E. 6 G. 4. Page 431

## MAGISTRATE.

*See JUSTICE OF THE PEACE.*  
*TRESPASS*, 1, 2.

## MALICIOUS ARREST.

*See ACTION ON THE CASE.*

## MARRIAGE SETTLEMENT.

*See LIMITATION OF ESTATE.*

## MEMORIAL.

*See ANNUITY.*

## MONEY HAD AND RECEIVED.

*See ASSUMPSIT*, 2.

## NEW TRIAL.

*See BANKRUPT*, 2.

CARRIER.

PRACTICE.

SLANDER.

1. The Court will not grant a new trial on the ground of a trifling inaccuracy of the judge in his direction to the jury, if the verdict appears to meet the justice of the

case. *Wickes v. Clutterbuck*, H. 5 & 6 G. 4. *Page 63*

**OVERSEER OF THE POOR.**  
*See BASTARDY-BOND.*

## PARSON.

*See TITHES.*  
TRESPASS, 4.

## PARTNERS.

*See ASSUMPSIT, 2.*

1. Three of five partners signed a submission to arbitration:—*Held*, that it did not bind the two who had not signed, although the subject matter referred arose out of the business of the firm; it not being within the ordinary course of transactions in trade between partners. *Stead v. Salt*, E. 6 G. 4. 389
2. The plaintiff, the defendant, and one J. C. being jointly concerned in trade, J. C. consigning goods to the defendant to sell on the joint account, the profits being to be divided equally between them; bills of exchange were given in payment for them by J. C., which were drawn by him on the plaintiff. The latter having expressed a reluctance to accept the bills without security, the defendant undertook to provide for them when at maturity, out of the proceeds of sales already in his hands:—*Held*, that the plaintiff, having accepted and paid the bills, might recover against the defendant on a count for money had and received; although he had declared specially on the undertaking, and there was a variance between the contract alleged and that proved; and although it was alleged that it was a partnership transaction, and that one partner could not maintain an action against another;—the money in, the de-

fendant's hands becoming, when the bills were paid by the plaintiff, separated from the partnership account. *Coffey v. Brian*, E. 6 G. 4. *Page 341*

## PLEADING.

*See ACTION ON THE CASE, 1,*  
COVENANT.  
REPLEVIN, 1, 2.  
TRESPASS, 3, 5.

1. Where to an action of trespass and false imprisonment against A. and B., they pleaded *jointly*, that, the horse of A. having been taken out of his close without his consent, and found in the plaintiff's stable, and that A., having strong grounds to believe, and believing, that the horse had been stolen by the plaintiff, gave charge of him to B., a constable, in order to his being taken before a magistrate, and that, the plaintiff resisting and assaulting A. and B., they defended themselves and took him to a police office:—*Held*, ill on demur-  
rer, it affording no ground of justifi-  
cation to A.; and that, being bad  
as to him, it was bad as to both A.  
and B. *Hedges v. Chapman*, H. 5 & 6 G. 4. 143
2. A count in *assumpsit* stated, that the plaintiff, at the request of the defendant, had retained him to lay out 700*l.* in the purchase of an annuity; that the defendant promised to use due care to lay out the money in such purchase, the pay-  
ment whereof should be well and sufficiently secured; that the plain-  
tiff, confiding in the defendant's promise, delivered the money to him for that purpose; but that he advanced it on a bad and insufficient security:—*Held*, that, after verdict, it must be taken that the promise was made in con-  
sideration of the delivery of the

money, which was a sufficient consideration; and that, even if such consideration were insufficiently stated, no objection could be raised to it, either in arrest of judgment, or by writ of error. *Whitehead v. Greetham*, H. 5 & 6 G. 4.

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3. It is no ground of error, to entitle a declaration of *Michaelmas Term*, generally, although the cause of action be therein alleged to have accrued on the 18th November, as the whole term is in law considered as one day, and the declaration might have been delivered at any time within the Term. *Ruston v. Owston*, H. 5 & 6 G. 4. 194
4. The plaintiff declared in *assumpsit*, that certain differences had arisen, and a certain suit was pending in Chancery, in which the plaintiff, and divers other persons, including infants, were plaintiffs, and *P. K.*, *T. B.*, since deceased, and *J. R.*, defendants; and that it was ordered by the Vice-Chancellor, with the consent of the attorneys of the parties in the suit, that the several matters in question in the suit, and all disputes and differences then subsisting between certain of the plaintiffs, and *P. K.*, and *T. B.*, since deceased (being certain of the defendants), should be referred to the arbitrament of *W. C.* who was to be at liberty to make one or more award or awards as he should think fit, and that, in case either of the parties should happen to die before the making of the award, the reference was not to abate, but the executors and administrators of the party so dying were to be considered and taken as parties to the order, in like manner as their testator or intestate; that, before the making of the award, *T. B.* died, and the arbitrator afterwards awarded that the defendants, exe-

cutors of *T. B.*, should, on &c., pay the plaintiff £25*l.* out of *T. B.*'s assets; by reason of which, the defendants, as executors, became liable to pay, and, being so liable, they, *executors as aforesaid*, promised to pay:—*Held*, on special demurrer, that the action was well brought against the executors; and that the declaration was sufficient;—although it was objected, first, that the promise alleged to have been made by the defendants was a personal promise, and for which no consideration was stated; secondly, that a sufficient authority to refer was not shewn, as it was made by the consent of the attorneys of the parties, some of whom were infants, who could not appoint an attorney; and, lastly, that the authority to refer was revoked by the death of *T. B.*. *Dowse v. Coxe*, E. 6 G. 4.

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#### PLEDGE.

*See BROKER*, 2.

#### POWER.

1. A testatrix, being seised of one undivided moiety of an estate in *Surrey*, and having a power of disposing of the other moiety, of which power she was the creatrix, and having no other real estate there, devised all her freehold estate in *Surrey* to her nephew *J. R.*, for life, on condition that, out of the rents thereof, he should, from time to time, keep such estate in proper and tenantable repair; and, on his decease, to and amongst his children equally, at 2*l.*, and their heirs, as tenants in common; and, in default of such children, remainders over to the other nephews and nieces of the testatrix:—*Held*, that the devise was a sufficient execution of the power, and that both

moieties passed under it to the nephew; although it was objected that there was no reference to the power in the will, nor even an intent manifested by the testatrix, to pass the lands which were the subject of the power. *Denn d. Newell v. Roake*, H. 5 & 6 G. 4. Page 113

2. By a marriage-settlement, an estate was limited to the use of the husband for life; remainder to the use of the wife for life; remainder to the children of the marriage; and, in default of issue, to the use of such person as the wife should appoint; and, for default of such appointment, to the use of the right heirs of the survivor of the husband and wife, for ever; with power to the husband and wife to charge the estate; and a power to trustees, in whom the legal estate was vested, to sell, by the direction, and with the approbation, of the husband and wife, or the survivor. The husband and wife borrowed a sum of money, by way of annuity; created a term of 500 years; and levied a fine to *G.*, in fee, with a deed declaring the uses to be "in trust to secure the regular payment of the annuity, and for corroborating and strengthening the said term."—*Held*, that the fine did not operate to extinguish the power of the wife to consent to a sale of the settled estates, so as to prevent an exercise of the power of sale by the trustees. *Tyrrell v. Marsh*, E. 6 G. 4. 805

## POWER OF ATTORNEY.

1. A power of attorney, under seal, for transferring Government stock, is a *deed*; and the uttering of such an instrument, knowing it to be forged, is a capital offence, under the statute 2 Geo. 2, c. 25, s. 1. *The King v. Fauntleroy*, H. 5 & 6 G. 4. 1

## PRACTICE.

*See AFFIDAVIT TO HOLD TO BAIL.*

AMENDMENT.

ATTORNEY.

AWARD.

BAIL.

BAIL-BOND.

COSTS.

EJECTMENT.

EXECUTION.

FORMEDON.

INFERIOR COURT.

INQUISITION.

NEW TRIAL.

SHERIFF.

VARIANCE.

1. A plaintiff in an action for slander having obtained leave to amend his declaration by adding counts, the defendant pleaded a justification, and the plaintiff afterwards obtained a further order to amend by adding other counts, and the defendant had a rule to plead *de novo*:—*Held*, that he could not afterwards apply to strike out some of the counts as being unnecessary or superfluous. *Thomas v. Jackson*, H. 5 & 6 G. 4. 152

2. It is no ground of error to entitle a declaration of *Michaelmas Term* generally, although the cause of action be therein alleged to have accrued on the 18th November, as the whole term is, in law, considered as one day, and the declaration might have been delivered at any time within the Term. *Paston v. Owston*, H. 5 & 6 G. 4. 194

3. The Mayor, Bailiffs, and Burgesses, of *Berwick-upon-Tweed* being plaintiffs in the suit, the writ was directed to the Coroner, who was sworn to be one of the Burgesses. It being, however, mere serviceable process, the Court refused to set it aside, although it was objected that it should have been directed to elisors named by the Prothonotary. *Ber-*

- wick-upon-Tweed, Major &c. of, v. Williams, E. 6 G. 4. 266
4. On an affidavit of debt, sworn before, and filed with, the filacer for Middlesex, a *capias ad respondendum* issued to the sheriff of that county, against the defendant, who not being found there, an office copy of the affidavit, certified by the filacer for Middlesex, was filed with the filacer for Yorkshire; on which another *capias* was issued into the latter county, instead of a *testatum*; whereupon the defendant was arrested:—*Held*, that this was irregular, as a fresh affidavit should have been sworn before the filacer for Yorkshire. *Dorville v. Whomwell*, E. 6 G. 4. 318
5. The plaintiff, having obtained a verdict against the defendant, entered up judgment, and sued out execution against his goods:—The Court refused to allow the sum levied to be impounded in the hands of the sheriff until an action which the defendant had commenced against the plaintiff as the acceptor of a bill of exchange, had been determined. *Williams v. Cooke*, E. 6 G. 4. 321
6. A defendant having been arrested by the initials of his Christian name only, and having signed a bail-bond in like manner:—The Court ordered the bail-bond to be delivered up to be cancelled, and a common appearance entered; but said, that, if a party sign a written instrument by his initials only, and refuse to give his full name on entering into a bail-bond, the Court will not relieve him on motion. *Fahrbach v. Soldiers*, E. 6 G. 4. 322
7. The defendant's attorney entered into the usual undertaking, under a Judge's order, to pay the plaintiff the amount of his debt and costs, on the proceedings being stayed; and the defendant died

- before taxation:—*Held*, that the attorney was still bound to perform his engagement. *Helling v. Jones*, E. 6 G. 4. 360
8. An action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong done to the other. Where, therefore, an action was brought, and a verdict obtained, by two plaintiffs against a defendant, for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them:—The Court ordered the judgment to be arrested:—But, the jury having, by their verdict, confined the damages to the expenses which the plaintiffs had been jointly put to in procuring their liberty, the Court ordered the *postea* to be amended. *Barrett v. Collins*, E. 6 G. 5. Page 446
9. An attorney, without being duly authorized by the tenant, commenced an action of replevin, in his name, against his landlord, and the tenant allowed the cause to be tried, and, having obtained a verdict, caused satisfaction to be entered on the record, the attorney's costs not being secured or paid:—The Court refused to vacate the entry, although the attorney insisted that it was made, through the collusion of the plaintiff and defendant, in order to deprive him of his costs. *Abbott v. Rice*, T. 6 G. 4. 489
10. By the practice of this Court, a second or *alias fieri facias* may be tested on, and issued before, the *quæria die post* of the return of the first, provided there be fifteen days between the tests of the first writ and the return of the second Sunday, unless it be the last day, is reckoned as one of the four which must elapse between the return of the second writ, and the

- day of signing judgment. *Combe v. Cuttill*; T. 6 G. 4. 534
11. The Court refused to order the proceedings on a writ of right to be stayed, until payment, by the tenant, of the costs of a former action of ejectment, between the same parties, for the recovery of the same premises. *Chafield*, defendant; *Souter*, tenant; T. 6 G. 4. *Page 572*
12. The Court, on motion, will not set aside the allowance of a writ of error. *Jones v. De Liste*, T. 6 G. 4. *617*

## PRISONER.

*See INSOLVENT DEBTOR.*

## PROMISSORY NOTE.

*See INSOLVENT DEBTOR, 1.*

## RECOVERY.

1. The Court permitted a fine and recovery to be amended, by inserting the words "upon *Trent*," after those of "the parish of *Stoke*," on affidavits stating that the property intended to be conveyed, was situate in the parish of *Stoke upon Trent*, and that there was no parish in the county called "*Stoke*," but merely a hamlet of that name, in which the parties had no property. *Smith*, defendant; *Brock*, tenant; *———*, vouchee; H. 6 & 8 G. 4. *109*
2. In a recovery, the property was described as "a moiety of the vicarage, &c." and in the deed to lead the uses, as a "moiety of the advowson of the vicarage, &c." The Court allowed the recovery to be amended, by inserting the words "of the advowson," before "of the vicarage;" and, the deed to lead the uses having been lost, the Secondary read the description of the premises from the enrolment of such deed. *King*, defendant; *Shepherd*, tenant; *Germain*, vouchee; H. 6 G. 4. *251*

3. The Court will not allow a recovery to be amended by inserting the words "advowson and tithes," although the deed to lead the uses contain the general word "hereditaments," without an affidavit stating how the presentations have gone from the time of suffering the recovery, and by whom the last was made, and whether prior to or since the recovery. *Holmes*, defendant; *Seton*, tenant; *Forenman*, vouchee; T. 6 G. 4. *Page 585*

## REPLEVIN.

1. In replevin, the defendant avowed for rent in arrear for a dwelling-house with the appurtenances; and it appeared in evidence, that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants:—*Held* to be no variance. *Page v. Chuck*, E. 6 G. 4. *264*
2. In an action of replevin for taking the plaintiff's cattle, the defendant avowed under a grant of common of pasture, from the lord of the manor, to the burgesses of the borough of *A.*; and the plaintiff pleaded in bar, that the corporation of *A.* had been accustomed to appoint a reasonable and proper number of herds, for (amongst other things) taking care of the cattle put upon the common; and also to appoint, for the pains of each such herd, a reasonable and proper number of stints of each of such herds, to be depastured thereon:—*Held*, sufficient after verdict; although it was urged that the number of herds and stints, and the dues required from the herds, should have been set out with certainty in the plea. *Elliott v. Hardy*; E. 6 G. 4. *847*
3. An attorney, without being duly authorized by the tenant, com-

inenced an action of replevin in his name against his landlord, and the tenant allowed the cause to be tried, and, having obtained a verdict, caused satisfaction to be entered on the record, the attorney's costs not being secured or paid:—The Court refused to vacate the entry, although the attorney insisted that it was made, through the collusion of the plaintiff and defendant, in order to deprive him of his costs. *Abbott v. Rice*, T. 6 G. 4.

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## REPLEVIN-BOND.

1. The plaintiff having obtained an execution, warranted by a regular judgment, in an action on a replevin-bond, the Court refused to set it aside, although it appeared that the bond was given for the prosecution of a prior distress which had been abandoned, as the objection might have been taken at an earlier stage of the proceedings. *Short v. Hubbard*, H. 5 & 6 G. 4. 107
2. In an action on the case against the sheriff, for taking insufficient sureties in replevin, the assignee of the replevin-bond cannot recover, as special damage, the costs incurred by him in suing the sureties without effect, unless notice of his intention to sue them had been previously given to the sheriff. *Baker v. Garratt*, E. 6 G. 4.

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## RIGHT OF WAY.

*See TRESPASS*, 3.

## RIGHT, WRIT OF.

*See PRACTICE*, 11.

## SALE.

*See ASSUMPSIT.*

## SCIRE FACIAS.

1. By the practice of this Court, a

## SHERIFF.

second, or *alias scire facias* may be tested on, and issued before, the *quarto die post* of the return of the first, provided there be fifteen days between the *testis* of the first writ, and return of the second. *Sunday*, unless it be the last day, is reckoned as one of the four which must elapse between the return of the second writ, and the day of signing judgment. *Combe v. Cuttill*, T. 6 G. 4. Page 584

## SET-OFF.

1. Costs of a judgment as in case of a nonsuit entered up against the plaintiff after his becoming bankrupt, cannot be set off by the defendant against the costs of another action brought against him by the assignees for the same cause. *West v. Pryce*, H. 5 & 6 G. 4. 154
2. An arbitrator, to whom all matters in difference between the plaintiff and defendants were referred, having directed a verdict to be entered for the plaintiff, in an action of trespass brought by him against the defendants, with 40s. damages, and found that 101*l.* were due from the former to the latter, for goods sold, which sum he directed the plaintiff to pay the defendants within two months next after the date of the award; and the plaintiff's costs of his action were taxed at 102*l.*:—*Held*, that the defendants could not set off the sum directed to be paid to them by the plaintiff against such taxed costs, the time allowed for the payment of such sum not having expired when the application was made. *Young v. Gye*, H. 5 & 6 G. 4.

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## SHERIFF.

1. If a writ of *s. fa.* be not delivered to the sheriff for the purpose of execution, and the goods of the

party against whom it issued be taken under a second writ, the sheriff may return *nulla bona* to the first. Where, therefore, the plaintiff's attorney inclosed a writ of *s. s.a.* to the sheriff's officer in a letter, and told him that he might with safety put the defendant's mother, or any one else, in possession of the defendant's goods; and the officer acted accordingly, and left his warrant in the charge of one of the defendant's shopmen, and the business was transacted as usual for nearly three months from the time the warrant was left; and the shopman accounted to the officer for the monies received, who paid them over to the sheriff; the defendant having become bankrupt, his assignees indemnified the sheriff in returning *nulla bona* to the writ issued previously to the bankruptcy:—In an action against the sheriff for a false return, the jury having found that the writ was sued out for the purpose of protecting the property of the party against the creditors, the Court refused to grant a new trial, on the ground that the plaintiff had not made out the allegation in her declaration, that the writ was delivered to the sheriff to be executed in due form of law. *Doker v. Hasler, H. 5 & 6 G. 4.*

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2. The plaintiff having obtained a verdict against the defendant, entered up judgment, and sued out execution against his goods:—The Court refused to allow the sum levied to be impounded in the hands of the sheriff, until an action, which the defendant had commenced against the plaintiff, as the acceptor of a bill of exchange, had been determined. *Williams v. Cooke, E. 6 G. 4.* 321
3. In an action on the case against the sheriff, for taking insufficient

sureties in replevin, the assignee of the replevin bond cannot recover, as special damage, the costs incurred by him in suing the sureties without effect, unless notice of his intention to sue them had been previously given to the sheriff. *Baker v. Gerratt, E. 6 G. 4.*

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4. In *trover* against the sheriff for taking the plaintiff's goods, under an execution against a third person, the officer who levied was *subpoenaed*, but not with a *duces tecum*, and, when called, he stated that he had returned the warrant to the under-sheriff. The plaintiff had also served the attorney (on the record) for the plaintiff with a notice to produce the warrant; and it appeared that the defendant *was in office at the time it was returned*:—*Held*, that the notice to the defendant's attorney to produce the warrant, was equivalent to subpoenaing the under-sheriff to produce it, and entitled the plaintiff to give parol evidence of its contents. *Taplin v. Atty, T. 6 G. 4.*

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### SLANDER.

*See LIBEL.*

1. The plaintiff declared that he was a farmer and vendor of corn, and that the defendant said of him, as such,—“ You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats, worse by sixpence a bushel than I bargained for:”—*Held*, actionable, without proof of special damage, as such words imputed to the plaintiff fraud in his business as a seller of corn. *Thomas v. Jackson, E. 6 G. 4.* 425
2. Where, in an action of slander, for giving a servant a false character, a rule for a new trial was made absolute, and the plaintiff had leave to amend one of the

counts of the declaration, in order that the words charged to have been spoken might be made to correspond with those proved at the first trial:—The Court allowed a new count to be added, to enable the parties to try the merits at the second trial. *Wyatt v. Cocks*, *T. 6 G. 4.* *Page 504*

## STAMPS.

*See BOND.*

## STATUTE OF FRAUDS.

*See FRAUDS, STATUTE OF.*

## STATUTE OF LIMITATIONS.

*See LIMITATIONS, STATUTE OF.*

## STATUTES CITED OR COMMENTED ON.

*James 1.*

21. c. 19. s. 11. Bankrupt. 49

*William 3.*8 & 9. c. 11. s. 8. Bond—Sug-  
gestion of Breaches. 549*Anne.*12. stat. 2. c. 16. s. 2. Usury—  
Broker. 178*George 1.*

8. c. 22. s. 1. Forgery. 4

*George 2.*

2. c. 25. s. 1. Forgery. 2

4. c. 28. s. 4. Landlord and Te-  
nant—Rent. 255-724. c. 44. Justice of Peace—Action,  
Notice of. 8829. c. 37. *Sheffield* Court of Re-  
quests. 32

31. c. 22. ss. 77-8. Forgery. 3-4

*George 3.*

4. c. 25. Bank of England. 13

5. c. 14. s. 3. Fishery—Convic-  
tion. 65

xii. c. cviii. Turnpike Act. 293-4

17. c. 26. s. 6. Annuity. 174

## TRESPASS.

33. c. 54. ss. 15, 16. Friendly So- cieties.	Page 379—380
37. c. 90. s. 27. Attorney—Certi- ficate.	272
45. c. 89. s. 2. Deed—Forgery. 3	
48. c. 103. <i>Sheffield</i> Court of Re- quests.	32
54. c. 168. Power—Attestation.	133
55. c. 184. Stamps—Bond.	365

George 4.	
1. c. 119. Insolvent Debtor.	98
_____ s. 10. Insolvent.	546
_____ 28. Insolvent.	551
1 & 2. c. lvi. Turnpike Act.	294
1 & 2. c. 87. ss. 12—33. Corn- Factor.	202, 203
3. c. 23. Justice of Peace—Con- viction.	388

## STRIKING OUT COUNTS.

*See PRACTICE, 1.*

## SUBPCENA.

*See EVIDENCE, 5.*

## SURETY.

*See BASTARDY-BOND.  
BOND.*

## TITHES.

1. An agreement by a clergyman, to take tithes of wheat by one sheaf out of each shock of ten, progressively, viz. the first sheaf of the first shock, the second of the second, the third of the third, and so on:—*Held*, good. *Collier v. Jacob, E. 6 G. 4.* 428

## TOLLS.

*See TURNPIKE.*

## TOMB-STONE.

*See TRESPASS, 4.*

## TRESPASS.

*See BANKRUPT, 2.*

1. A magistrate is bound by an erro-

neous commitment, notwithstanding a previous regular conviction: Where, therefore, a warrant of commitment, under the statute 5 Geo. 4, c. 14, for fishing in a private fishery, did not state that the offence was committed in *inclosed ground*:—*Held*, to be bad; and that an action for false imprisonment was maintainable against the magistrate issuing it. *Wickes v. Clutterbuck*, H. 5 & 6 G. 4.

*Page 63*

2. Trespass does not lie against a magistrate for any thing done by him in the discharge of his duty, unless he be made acquainted with every fact necessary to enable him to determine, when called on to act. Where, therefore, the treasurer of a benefit society brought such action against a magistrate, for issuing a warrant of distress against him, upon a previous order of two magistrates for the relief of a member, in pursuance of the statute 33 Geo. 3, c. 54, s. 15:—*Held*, that the action could not be maintained; it appearing, on the face of the order, that the treasurer made no defence, the defendant's jurisdiction not having been questioned at the time, and the treasurer having neglected to present to his notice a rule of the society, which directed all disputes between its members to be referred to arbitration; and which rule was confirmed by sect. 16 of the statute, whereby the award was made conclusive, without being subject to the control of the magistrates. *Pike v. Carter*, E. 6 G. 4. 376

3. In trespass for breaking and entering the plaintiff's close, the defendant pleaded a right of way granted by deed to the persons under whom he claimed, but which deed he averred to be lost; the plaintiff replied, traversing the grant. At the trial, it appeared that

the right had been frequently disputed, and the judge told the jury, that, if they thought that the defendant had uninterruptedly enjoyed the right of way for more than twenty years, it would be presumptive evidence of the existence of a grant; that, if they thought there had been a deed of grant, they would find for the defendant; but, if they thought there had been none, then for the plaintiff:—*Held*, that such direction was right. *Livett v. Wilson*, E. 6 G. 4.

*Page 494*

4. Trespass may be maintained for taking away a tomb-stone from a church-yard, and obliterating an inscription made upon it, at the suit of the party by whom it is erected, although the freehold of the church-yard is in the person; as the right to the tomb-stone vests in the person who erects it, or in the heirs of the deceased in whose memory it is set up. *Spooner v. Brewster*, T. 6 G. 4. 494
5. To a declaration in trespass for assaulting the plaintiff, beating and kicking him, and tearing his clothes, the defendant pleaded that he was not guilty of the said supposed assaults, *in manner and form* as the plaintiff had complained against him. The jury having found a verdict for the plaintiff, damages 20s., and the judge not having certified:—*Held*, that the plaintiff was entitled to no more costs than damages, as the plea in substance denied the *battery* and tearing of the clothes, as well as the assault. *Weatherill v. How ard*, T. 6 G. 4. 502

#### TROVER.

*See BROKER*, 2.  
*SHERIFF*, 4.

#### TRUSTEES.

*See DEVISE.*

## TURNPIKE.

1. By a turnpike act it was enacted (*inter alia*), "that a toll of six-pence should be demanded and taken, for every horse drawing any stage-coach, from the person or persons attending the same." A subsequent clause provided, "that, if any person or persons should have paid the toll for any cattle or carriage passing through the gate, *the same person or persons*, on producing a ticket, should be permitted to pass and repass the same gate with *the same cattle or carriage*, toll-free, at any time during the same day." A stage-coach, drawn by four horses, passed through and paid toll; in the evening of the same day, a different coach, called by the same name, belonging to the same proprietors, and drawn by the same four horses, but driven by a different coachman, and carrying different passengers and parcels for hire, passed through the same gate:—*Held*, that a second toll was not payable in respect thereof. *Norris v. Poate*, E. 6 G. 4. *Page 293*

## UNDER-SHERIFF.

*See Evidence*, 5.

## USURY.

*See Broker*, 1.

1. Where the defendant, by a deed, in the form of a demise, conveyed certain stock, premises, &c. to *B.*, on condition of his paying certain sums by way of rent, but which in fact amounted to the sum for which the defendant had agreed with *B.* to sell them to him, and 10*l. per cent.* interest for the time allowed on each payment, and *B.* was let into possession of the premises, and continued therein for four months, when he became bankrupt:—*Held*, that such deed was usurious. *Sinclair v. Steavenson*, H. 5 & 6 G. 4. *46*

## WILL.

## VARIANCE.

1. In ejectment to recover premises for non-payment of rent, a variance between the amount of rent stated in the particulars of demand of the lessors of the plaintiff, and the amount proved at the trial to be due:—*Held*, to be immaterial. *Tenay d. Gibbs v. Moody*, E. 6 G. 4. *Page 252*
2. In replevin, the defendant avowed for rent in arrear for a dwelling-house with the appurtenances; and it appeared in evidence that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants:—*Held*, to be no variance. *Page v. Chubb*, E. 6 G. 4. *264*

## WARRANT OF ATTORNEY.

1. An insolvent debtor applied for his discharge under the statute 1 Geo. 4, c. 119, and gave a creditor, who threatened to oppose him, a promissory note for the amount of his debt, and he accordingly withdrew his opposition, and the insolvent, after his discharge, was arrested on the note, but settled the action by giving a warrant of attorney, for the debt and costs, payable by instalments:—The Court set aside the warrant of attorney, and ordered an instalment paid by the insolvent to be returned to him, on the ground that the note and warrant of attorney were contrary to the policy of the statute, and operated as a fraud on the other creditors. *Rogers v. Kingston*, H. 5 & 6 G. 4. *97*

## WAY, RIGHT OF.

*See Trespass*, 3.

## WILL.

*See Devise*.

1. A testator, by his will, duly at-

tested, after devising his *Clifton* estate to his son, in fee, devised all his *Orchard* estate to trustees (whom he named his executors), and their heirs, directing them to sell it; having afterwards sold his *Clifton* estate, and purchased another called *Allerton* Hall, he, by a codicil written on the back of the will, attested by two witnesses only, directed that the money obtained from the sale of the *Clifton* estate should go to a general fund, to be divided amongst all his children; and also that *Allerton* Hall should be sold, and its produce applied in like manner; and he appointed his wife an executrix jointly with those named in the will. By a second codicil, also attested by two witnesses only, he, after stating that one half of the *Orchard* estate was

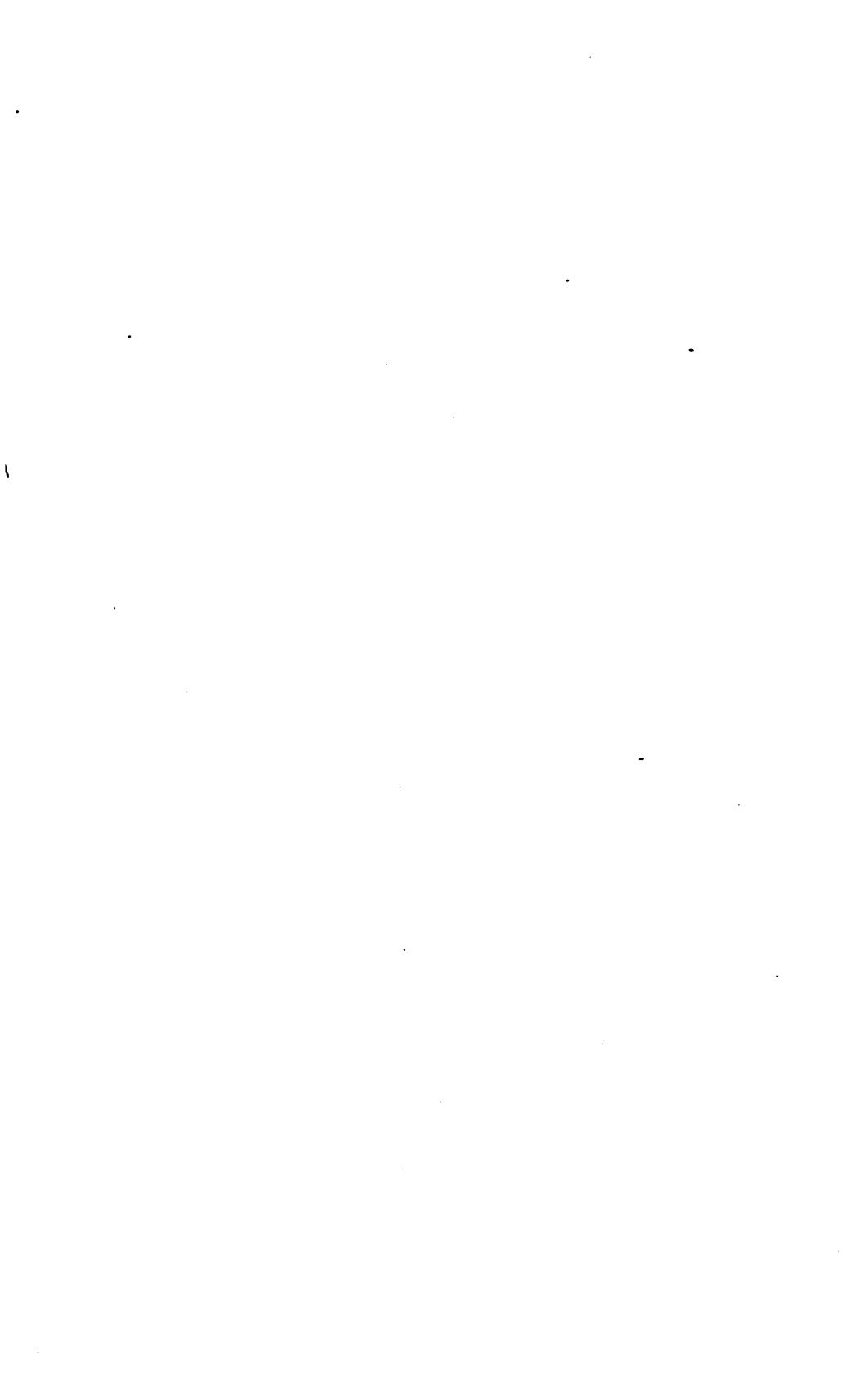
sold, and giving directions as to the sale of the other half, appointed new executors in lieu of those named in the will; subsequently, he made a third codicil, duly attested, by which he merely appointed another executor in the room of one of those last named; all the codicils were written on the back sheet of the will:—*Held*, that the third codicil operated as a republication of the will, and of the second codicil; and that the legal fee in the *Allerton* estate passed by the will, so republished, to the trustees therein named. *Guest v. Willasey*, E. 6 G. 4. Page 225

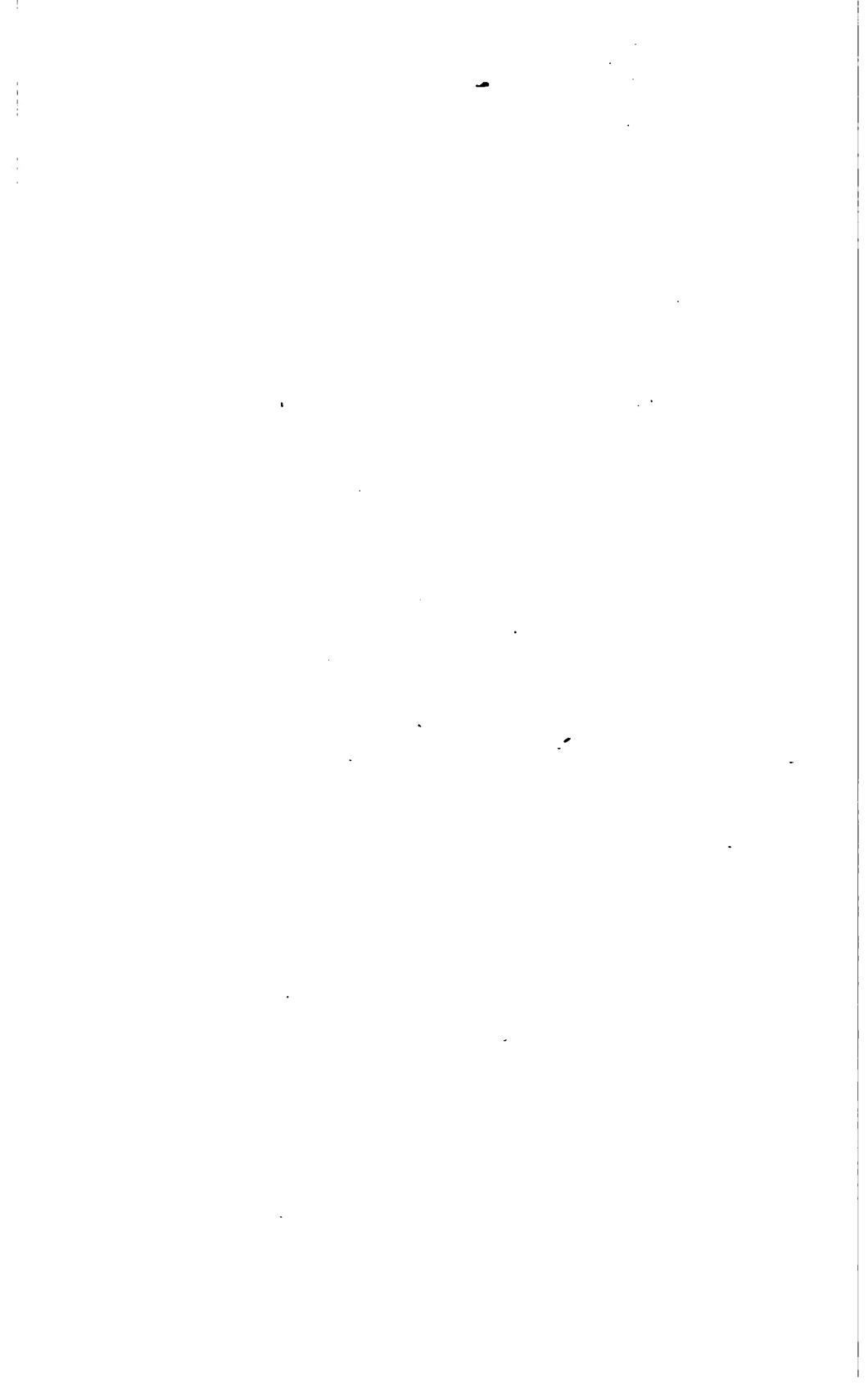
## WRIT OF RIGHT.

*See PRACTICE*, 11.

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